IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 221

WALTER J. HICKEL, Secretary of the Interior

—v.—

THE OIL SHALE CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Page
Docket Entries	1
District Court	1
Court of Appeals	1
No. 9581	
Complaint	5
Defendant's Motion to Dismiss	16
Answer	17
Defendant's Pre-Trial Statement	23
Memorandum Opinion and Order filed December 21, 1966	26
Judgment filed March 1, 1967	48
Notice of Appeal of Defendant	51
Transcript of the court reporter of the proceedings had in the trial to Court before the Honorable William E. Doyle, Judge, presiding, on July 18-19, 1966	52

Page

Plaintiff's Exhibits:

1—Memorandum for the Secretary of the Interior 4/20/20 62

2—Report of the Secretary of the Interior 63

3—Letter to Secretary of the Interior from Commissioner, dated March 7, 1927 64

4—Letter to the Commissioner from E. C. Finney 65

5—Memorandum for the Secretary from C. L. Moore 5/7/30 67

6—Letter to Mr. Rene L. De Rouen from Harold Ickes 6/16/39 68

8—Letter to Register from Wm. Spry 12/10/27 (Clerk's Note) 69

9—Letter to Register from Commissioner 5/4/28 (Clerk's Note) 69

10—Letter to Register from Wm. Spry 12/10/27 (Clerk's Note) 69

11—Letter to Register from Wm. Spry 5/4/28 (Clerk's Note) 69

12—Letter to Register from Wm. Spry 12/10/27 (Clerk's Note) 69

13—Letter to Register from Wm. Spry 5/4/28 (Clerk's Note) 69

14—Letter to Register from C. C. Moore 6/12/29 (Clerk's Note) 69

15—Report of the Secretary of the Interior 70

16—Telegram to Kelly from Moore 1/15/30 70

17—Letter to Kelly from Moore 3/26/30 71

18—Letter to Mr. R. S. Kelley from C. C. Moore 4/19/30 72

19—Memorandum for the Press 9/29/30 74

20—Letter to the Secretary of Agriculture from Ray Lyman Wilbur 6/7/30 75

21—Report of the Secretary of the Interior 76

22—Report of the Secretary of the Interior 1932 77

23—Report of the Secretary of the Interior 1933 78

24—Letter to Register from C. C. Moore 7/8/30 78

25—Letter to the Secretary of the Interior from C. C. Moore dated 6/7/30 79

Page

Plaintiff's Exhibits—Continued

26—Letter to Kelley from Commissioner 6/19/30 81
27—Telegram to Commissioner from Kelley 6/23/30 (Clerk's Note) 81
28—Letter to Kelley from Moore 6/30/30 (Clerk's Note) .. 81
29—Letter to Register from Moore 6/30/30 (Clerk's Note) 82
30—Letter to Register from Moore 7/22/30 (Clerk's Note) 82
31—Letter to Register from Moore 7/3/31 82
32—Letter to Register from acting Commissioner 11/9/31 83
33—Letter to Register from Moore 6/30/30 (Clerk's Note) 83
34—Letter to Register from acting Commissioner 10/8/31 83
35—Letter to Register from Moore 6/30/30 (Clerk's Note) 85
36—Letter to Register from acting Commissioner 10/20/31 85
37—Letter to Secretary of the Navy from Ray Lyman Wilbur 11/13/30 86
38—Letter to A. D. Hathaway from acting Commissioner 11/12/30 87
39—Letter to Walter Spencer from Moore 7/20/31 (Clerk's Note) 88
40—Letter to Register from Moore 12/2/31 88
41—Appeal from the General Land Office 3/10/32 90
42—Photostat of letter to Register from Moore 1/20/32 (Clerk's Note) 91
43—Letter to Attorney General from Harold Ickes 3/16/33 91
44—Summaries of Bureau Reports 93
45—Appeal from General Land Office 8/13/35 93
46—Letter to Doctor McKee from T.A. Walters 5/26/34 .. 95
47—Memo for the Press 2/12/31 96
48—Letter to Messrs. Thomas from John H. Edwards 9/9/30 97

Page

Plaintiff's Exhibits—Continued

49—Letter to Eli F. Taylor from Harold Ickes 5/26/33 .. 97
50—Letter to Attorney General from Harold Ickes 2/6/34 98
51—Letter to Jenson from Franklin Lane 10/23/18 99
52—Letter to Chris Dere from acting Asst. Commissioner 1/20/19 100
53—Letter to Clarence E. Taylor from Asst. Secretary 6/2/33 101
54—Letter to W. J. Owen from Johnson 6/28/35 101
55—Letter to Gowin from Johnson 7/25/35 102
56—Letter to Van Dorsten from Johnson 7/26/35 103
57—Letter to Willard Boeher from Johnson 7/20/35 103
58—Letter to Stephen O. Chappell from Johnson 7/20/35 104
59—Letter to Senator Ecton from Chapman 2/11/48 104
60—Decisions Relating to Public Lands 105
62—Letter to Phipps from Payne August 4, 1920 110
63—Motion for Summary Judgment 4/15/55 110
65—Letter to Commissioner from Register 6/15/35 117
66—Letter to Joseph Bellis from Johnson 6/24/35 117
67—Letter to E. P. Costigan from Jos. Ahearn 6/8/35 118
68—Letter to Costigan from Johnson 6/24/35 119
69—Motion for Rehearing 9/3/35 120
70—Decisions of the Department of the Interior 121
71—Letter to Register from Commissioner 7/6/35 123
72—Letter to Register from Johnson 7/29/35 125
73—Letter to Register from Johnson 7/30/35 126
74—Letter to Register from Johnson 7/31/35 127
75—Certified copy of Letter to Register from Johnson 10/4/65 128
76—Appeal from the General Land Office 7/30/35 130
77—Appeal from General Land Office Re: U.S. Oil Shale Co. 131
78—Letter to Register from Johnson 8/1/35 132
79—Letter to Register from Johnson 8/19/35 137
80—Letter to Register from Johnson 8/19/35 138

Page

Plaintiff's Exhibits—Continued

82—Memorandum for the Register from Johnson 3/30/40 139
83—Letter to Commissioner from Gardner 4/26/40 140
84—Memo for Register 3/6/41 141
85—Memo for the Register 8/9/40 142
87—Memo for the Register 8/9/40 143
89—Memorandum for the Register from Commissioner 8/9/40 144
91—Memo for the Supervisor from Waddell 6/5/42 145
91A-Memo for Wolfsohn from Havell 7/29/42 146
95—Oil Shale Claims patented on Applications filed 148
102—Photocopy of a Page 91 Description of tract (Clerk's Note) 158
103—Photocopy of a Page 96 Description of tract (Clerk's Note) 158
104—Final Cert. of Mineral Entry 2/25/49 158
114—Oil Shale Mineral Entries 2/27/50 158
115—Decision 3/7/50 160
117—Memo to Regional Administrator from Zimmerman 11/7/50 161
119—Report 11/28/55 162
120—Memo to Land Office Manager from J. Elliott Hall 12/19/55 164
121—Letter to Eaton from Fishman 2/3/56 164
122—Final Cert. of Mineral Entry (Clerk's Note) 165
123—Memo to Rose Beall from W. L. Shafer 6/15/56 165
124—Final Cert. of Mineral Entry 9/4/56 (Clerk's Note) 165
125—Memo of Valuation Engineer Sholes 2/12/57 166
126—Memorandum to Director from Puckett 11/20/57 174
127—Memorandum to Director from J. Elliott Hall 1/27/58 175
128—Memo to State Lands Mineral Officer 11/20/58 175
129—Memo to State Land Office Mgr. 11/20/58 176
130—Memo to Director from Fox 12/30/58 177
131—Final Cert. of Mineral Entry 11/5/56 (Clerk's Note) 178

Page

Plaintiff's Exhibits—Continued

132—Memo to Land Office Mgr. 7/17/58 178
133—Memo to Chief, Patents Section 2/5/59 179
134—Mineral Report 6/11/58 180
135—Minerals Work Sheet 7/14/17 182
136—Memo to Director from Andrus 12/21/59 182
136A-Letter to Altenbern from Johnson 7/17/35 183
138—Report 11/21/55 184
139—Mineral Work Sheet 11/25/57 (Clerk's Note) 186
140—Final Cert. of Mineral Entry (Clerk's Note) 186
141—Memo to Chief, Patent Section from Shafer 6/26/58 .. 186
142—Mineral Report 11/7/58 187
144—Memo to Area Administrator 9/9/57 188
149—Memorandum to Director from Andrus 11/24/59 189
151—Letter to Register from Moore 9/15/31 190
154—Memo to Associate Director from Caplan 5/19/60 191
154A-Memo to Solicitor from Director 2/23/60 191
156—Memo to State Supervisor from Kepford 12/11/59 192
157—Memo to Associate Solicitor from Regional Solicitor 7/6/61 193
175—Letter to Taylor from Commissioner 7/17/35 194
176—Letter to Secretary of the Navy from Acting Secretary of the Interior 10/31/35 195
177—Letter to Secretary of the Navy from Harold Ickes 9/30/49 197
178—Memo to Director, Bureau of Mines 9/30/49 198
180—Letter to Ida Dere from Commissioner 5/4/36 199
181—Letter to Commissioner General Land Office from Ida Dere 4/22/56 200
182—Letter to the Commissioner of the General Land Office from Alex Bowie 3/25/36 201
183—Letter to Alexander Bowie from Commissioner 4/7/36 201
184—Letter to Register from Acting Commissioner 8/26/31 202
185—Letter to Register from Moore 5/29/31 203
186—Letter to Register from Commissioner 1/9/32 205

Page

Plaintiff's Exhibits—Continued

187—Letter to John Murphy from Commissioner 206
188—Memo for Carpenter 6/10/36 206
189—Letter to Director from Johnson 3/1/37 207
190—Letter to the Commissioner from Julian Sears 1/30/37 208
191—Letter to Harold Ickes from Abe Murdock 6/9/41 210
192—Letter to Abe Murdock from Harold Ickes 7/25/47 211
193—Letter to C. H. Scholar from Oscar Chapman 11/10/41 212
194—Letter to Mr. Vice President from Harold Ickes 5/21/43 213
195—Letter to Edwin C. Johnson from Oscar Chapman 6/17/43 216
196—Letter to Warren Paddock from Johnson 2/14/44 217
197—Letter to Hoffman from Nelson 6/15/44 218
198—Letter to Nelson from Johnson 7/5/44 219
199—Letter to Nelson from Johnson 7/4/44 221
200—Letter to Dougherty from Johnson 7/26/45 223
202—Letter to Register from Moore 6/8/32 224
203—Memo for the Secretary from Forsling 12/3/45 225
204—Letter to Senator Myers from Chapman 3/21/46 227
205—Letter to Register from Acting Commissioner 11/10/31 228
207—Letter to Tupper, Smith & Holmes from Johnson 3/27/46 229
209—Letter to Whatley from Doty 8/29/50 232
210—Letter to Whatley from Chapman 3/30/51 235
211—Stipulation 235
212—Memo to Associate Solicitor from Kepford 8/20/59 237
215—Memo to Regional Solicitor from Bradshaw 12/3/59 238
216—Memo to Land Office Mgr. from Hall 8/3/60 239
217—Memo to Associate Solicitor from Kepford 9/18/61 240
218—Teletype to Regl. Solicitor from Cavanaugh 9/22/61 241
219—Memo to State Director Land Management from Kepford 9/26/61 242

Page

Plaintiff's Exhibits—Continued

225—Letter to McEniry from Commissioner 1/28/18 (Clerk's Note) 243
226—Letter to Attorney General from First Asst. Secy. 2/2/18 (Clerk's Note) 243
227—Letter to Herwick from Lenenberger 10/19/18 (Clerk's Note) 243
228—Deposition of Herwick 10/22/18 (Clerk's Note) 243
229—Letter to Commissioner from Mineral Examiner G. L. O. 11/12/18 243
230—Letter to Commissioner from Charles Duer 11/7/18 (Clerk's Note) 249
231—Letter to Commissioner from Charles Duer 11/9/18 (Clerk's Note) 249
232—Letter to Commissioner from Chief, Denver Field Div. 11/29/18 (Clerk's Note) 249
236—Letter to Commissioner from Acting Secy. 7/17/25 249
242—Letter to Commissioner from Sholes 2/28/29 250
244—Contest No. 12039 6/28/29 (Clerk's Note) 254
245—Letter to Index Shale Oil Co. 7/22/31 (Clerk's Note) 254
248—Memo to Marion Clawson from Miller 10/11/48 254
250—Mineral Entry (Clerk's Note) 255
251—Memo to Land Office Mgr. from Hall 3/6/57 256
252—Letter to Puckett from East 10/12/59 257
254—Memo to Director from Puckett 2/13/61 258
255—Mineral Report 4/12/61 259
256—Memo to Regional Director from Puckett 4/21/61 260
264—Case Record C-012327 261
283—Letter to the Commissioner from Bradshaw 1/24/31 (Clerk's Note) 268
284—Contest No. 147 269
286—Letter to R. D. George 9/6/17 270
288—Report of the Secretary of the Interior (1928) 271
289—Letter to Hazelwood from First Asst. Secy. 10/24/19 271
292—Letter to Register from Commissioner 6/28/35 272
296—Description of Claim (Clerk's Note) 273

Page

Plaintiff's Exhibits—Continued

297—Description of Claim (Clerk's Note) 273

306—Service Record of Altizer, Posey J. 273

307—Service Record of Chapman 277

308—Deposition of J. Elliott Hall 279

309—Deposition of William Shafer 285

313—Plaintiffs' Interrogatories, and Defendant's Answers Civ. 8680 305

314—Plaintiff's Interrogatories and Defendant's answers Civ. 9202 310

Defendant's Exhibits:

A—Contest 12039 313

D—Contest No. 028751 315

K—Docket Sheet, Minutes of Proceedings Bute #1-18 incl. Oil Shale Placers Claims, 1/2/1928
Atlas #1-18, Oil Shale Claims, 12/26/1919
Camp Bird #1-20 incl. Oil Shale Placers, 1/2/1920
Oyler #1 to 4, Sept. 25, 1916
Carbon Nos. 1-12 incl. May 18, 1918
United States Land Office Schedule of Allowances. NW; NE; SE, and SW, Oil Shale Placers, Contest 12972-1424895 "N" "RLW", July 29, 1931 Oil Shale Placers (Clerk's Note) 332

L—Notation of prefatory pages from Synopsis of meeting of Department of Interior Oil Shale Advisory Board and pages from Interim Report of Oil Shale Advisory Board to Secretary of the Interior 333

S—Decision of September 30, 1927, directing cancellation of the homestead entries because made upon lands covered by prior valid mineral locations.
Decision of July 1, 1931, declaring the mining claims null and void on an assessment work charge.
Decision of October 14, 1931, permitting the filing of an application for the reinstatement of the cancelled homestead entries
Decision of November 20, 1931, reinstating the homestead entries
The contest docket pages for Contest 12021, Contest 12022A and Contest 12178
serial register pages for serial No. 018827-032575 and serial No. 018825-032576 involving homestead entries re: Triumph Nos. 22 and 23, the F.D. No. 7, the J.D. Nos. 1, 2, 3 and 5 oil shale placer mining claims 335

Page

Defendant's Exhibits—Continued

U—Decision of August 18, 1930, declaring the Lucy Agnes No. 1 and No. 2 oil shale placer mining claims null and void.
The contest docket page for Contest No. 12372 involving the Lucy Agnes claims.
The serial register page for serial No. 038956 involving the oil and gas prospecting permit and the oil and gas lease. 339

W—Decision of Department of Interior dated June 24, 1935 re: The Shale Oil Company,
The contest docket pages for Contest No. 12019 involving the mining claims of The Shale Oil Company (Clerk's Note) 340

X—Departmental decision of November 11, 1930 involving the Federal Shale Oil Company and the Buck Canyon placer No. 1
Decision of January 5, 1931 from the Commissioner of the General Land Office promulgating the Departmental decision of November 11, 1930, and allowing the mining claimants 30 days in which to file a proper answer
Memorandum of February 27, 1931 from the Register of the Land Office advising that no answer had been filed
Decision of April 6, 1931 from the Commissioner of the General Land Office declaring the Buck Canyon No. 1 oil shale placer null and void
The contest docket for Contest No. 12264 involving the Buck Canyon No. 1 oil shale placer (Clerk's Note) 340

Y—Francis D. Weaver case:
Departmental decisions of August 23, 1930 and December 18, 1930 Instructions dated January 5, 1931, from the Commissioner relative to closing the case
Memorandum of May 4, 1934 transmitting the closed case records to the Commissioner of the General Land Office
The contest docket for Contest No. 12283 involving the Francis D. Weaver case (Clerk's Note) 340

KK—Term Rental Permits and Billings for Grazing Privileges and Licenses for Grazing Privileges 340

E—Letter to Dr. Ertl from J. Elliott Hall, Acting State Supervisor of December 16, 1960 340

Page

Defendant's Exhibits—Continued

No. 9582

Complaint with attached exhibits 342

Exhibit A-3—Written Decision, Union Oil Company of California, et al. A-29560, rendered by the Solicitor of the Department of Interior, 4/17/64 352

Answer 386

Judgment filed March 1, 1967 390

Notice of Appeal of Defendant 391

Clerk's Certificate 391

No. 9583

Complaint 392

Answer 401

Defendant's Statement 404

Judgment filed March 1, 1967 405

Notice of Appeal of defendant 407

Clerk's Certificate 407

No. 9584

Complaint 408

Answer 417

Defendant's Pre-Trial Statement 423

Supplement to defendant's pre-trial statement 426

Judgment filed March 1, 1967 427

Notice of Appeal of Defendant 432

Clerk's Certificate 433

Opinion of the Court of Appeals for the Tenth Circuit 434

Judgments of the Court of Appeals for the Tenth Circuit 447

Order of the Supreme Court of the United States granting a writ of certiorari 451

Relevant Docket Entries

(Oil Shale Corporation, and Energy Resources Technology Land, Inc. v. Walter J. Hickel, Secretary of the Interior, No. 9581)

Date	Proceedings
7/10/64	Complaint filed. Issued 4 summons.
12/ 7/64	Answer filed.
3/28/66	Order on Deft's. Motion for consolidation of No. 8680, No. 8685, No. 8691, and No. 9202.
12/21/66	Memorandum Opinion and Order of District Court filed.
3/ 1/67	Judgment entered.
4/26/67	Notice of Appeal filed by U.S. Attorney.
10/22/67	Record Docketed, Court of Appeal.
7/ 9/68	Argument, and submission of case.
2/ 4/69	Opinion issued, Court of Appeals.
3/12/69	Judgment issued as mandate.

Relevant Docket Entries

(Joseph B. Umpleby, and Wasatch Development Co. v. Walter J. Hickel, Secretary of the Interior, No. 9582)

Date	Proceedings
7/13/64	Complaint filed. Issued 4 summons.
9/11/64	Answer filed.
3/28/66	Order on Deft's. Motion for consolidation of No. 8680, No. 8685, No. 8691, and No. 9202.
12/21/66	Memorandum Opinion and Order of District Court filed.
3/ 1/67	Judgment entered.
4/26/67	Notice of Appeal filed by U.S. Attorney.
10/22/67	Record Docketed, Court of Appeal.
7/ 9/68	Argument, and submission of case.
2/ 4/69	Opinion issued, Court of Appeals.
3/12/69	Judgment issued as mandate.

Relevant Docket Entries

(Barnette T. Napier, et al. v. Walter J. Hickel, Secretary of the Interior, No. 9583)

Date	Proceedings
7/15/64	Complaint filed. Issued 4 summons.
9/11/64	Answer filed.
3/28/66	Order on Deft's. Motion for consolidation of No. 8680, No. 8685, No. 8691, and No. 9202.
12/21/66	Memorandum Opinion and Order of District Court filed.
3/ 1/67	Judgment entered.
4/26/67	Notice of Appeal filed by U.S. Attorney.
10/22/67	Record Docketed, Court of Appeal.
7/ 9/68	Argument, and submission of case.
2/ 4/69	Opinion issued, Court of Appeals.
3/12/69	Judgment issued as mandate.

Relevant Docket Entries

(Penelope Chase Brown, individually and as Trustee, and The Oil Shale Corporation v. Walter J. Hickel, Secretary of the Interior, No. 9584)

Date	Proceedings
6/14/65	Complaint filed. Issued 4 summons.
8/23/65	Answer filed.
3/28/66	Order on Deft's. Motion for consolidation of No. 8680, No. 8685, No. 8691, and No. 9202.
12/21/66	Memorandum Opinion and Order of District Court filed.
3/ 1/67	Judgment entered.
4/26/67	Notice of Appeal filed by U.S. Attorney.
10/22/67	Record Docketed, Court of Appeal.
7/ 9/68	Argument, and submission of case.
2/ 4/69	Opinion issued, Court of Appeals.
3/12/69	Judgment issued as mandate.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Pleas and proceedings before the Honorable Hatfield Chilson, Judge of the United States District Court for the District of Colorado, and the Honorable William E. Doyle, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

THE OIL SHALE CORPORATION, and ENERGY RESOURCES TECHNOLOGY LAND, INC., PLAINTIFFS

vs.

STEWART L. UDALL, Secretary of the Interior, DEFENDANT

No. 8680, Civil

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[1]

COMPLAINT FOR RELIEF IN THE NATURE OF MANDAMUS AND FOR DECLARATORY JUDGMENT

Plaintiffs The Oil Shale Corporation, et al., by their attorneys, for their complaint, allege:

First Claim

1. Plaintiff The Oil Shale Corporation is a corporation duly incorporated under and existing by virtue of the laws of the State of Nevada having its principal office and place of business at 680 Fifth Avenue, New York City, New York. Plaintiff Energy Resources Technology Land, Inc., is a corporation duly incorporated under and existing by virtue of the laws of the State of Colorado having its principal office and place of business at 305 South 39th Street, Boulder, Colorado.

2. The defendant, Stewart L. Udall, here sued in his official capacity, is the duly qualified and acting Secretary of the Interior of the United States, having his official place of business at the seat of the government in

Washington, D. C. Under and by virtue of 9 Stat. 395; 5 U.S.C. § 485; 43 U.S.C. §§ 2,1201; 1950 Reorganization Plan No. 3, 15 F. R. 3174, 64 Stat. 1262, the defendant is charged with the control, direction and supervision of all officers and employees of the Department of [2] the Interior, the administration and enforcement of all laws relating to the public lands and to mining claims thereon, and the issuance of rules and regulations relating thereto.

3. This action arises under the Constitution, more particularly the Fifth Amendment, and the laws of the United States including 30 U.S.C. §§ 22-38, pursuant to which plaintiffs claim vested rights in and to certain oil shale placer mining claims, and involves both the rights of the plaintiffs to enjoy and possess said mining claims without regard to certain unauthorized and invalid Department of the Interior contest proceedings hereinafter set forth, and the duty of the defendant owed to the plaintiffs to administer the laws under which plaintiffs claim said mining claims upon a proper construction of those laws. The matter in controversy, exclusive of interest and costs, exceeds in value the sum of $10,000. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331 and 1361.

4. This is an action to obtain an order and a judgment of this Court requiring the defendant to discharge his duties under the mining laws of the United States according to the requirements of those statutes as interpreted by the Supreme Court of the United States, and more particularly, to require the defendant to withdraw and expunge from the records of the Department of the Interior and decisions or judgments in the unauthorized and invalid contest proceedings more fully described hereinafter.

5. Plaintiff Energy Resources Technology Land, Inc., owns the Bute Placer Mining Claims Nos. 1 through 19, both inclusive, Nos. 21 through 28, both inclusive, and Nos. 30, 31 and 32. Plaintiff The Oil Shale Corporation owns the Bute Placer Mining Claims Nos. 33 through 48, both inclusive. Plaintiff Energy Resources Technology Land, Inc., owns the Camp Bird Placer Mining

Claims Nos. 1 through 20, both inclusive, and the Atlas Placer Mining Claims Nos. 1, 2, 3, 7, 9, 10, 12, 17 and 18. Plaintiff The Oil Shale Corporation is the [3] lessee, with an option to purchase, of the foregoing claims owned by Energy Resources Technology Land, Inc. The said Bute Claims are situated in and encompass Sections 7 through 18, both inclusive, of Township 4 South, Range 96 West of the 6th Principal Meridian, with the exception of the Southeast quarter of Section 10 and the Northeast quarter of Section 16. The said Camp Bird Claims are situated in and encompass Sections 2, 3, 4, 9, 16, and the Southeast quarter of Section 17, of Township 4 South, Range 95 West of the 6th P.M., with the exception of the Northeast quarter of Section 2. The said Atlas Claims are situated in and encompass the Northwest quarter of Section 10, the Southwest quarter of Section 12, the West half of Section 13, the East half and Southwest quarter of Section 14, and the South half of Section 15, of Township 4 South, Range 95 West of the 6th P.M. All of the foregoing placer mining claims contain valuable deposits of oil shale and are located in Rio Blanco County, Colorado.

6. In 1927, the defendant's predecessors in office instituted and thereafter conducted Contests Nos. 11,757, 11,759, and 11,761 against the vested rights in and to the mining claims referred to in Paragraph 5 above, owned by plaintiffs' predecessors in interest. The defendant's predecessors in office acted in those contests through subordinate agents, including the Commissioner of the General Land Office and the Register of the Denver Land Office, all of whom were exercising the authority of the defendant's predecessors in office and were subject to their supervision and control at all times. The said contest proceedings were based solely upon the charge that annual assessment work in the amount of $100 had not been performed upon or for the benefit of each of the above mining claims.

7. In initiating and conducting the contests, the [4] subordinate agents purported to act pursuant to Departmental Circular No. 460 "Manner of Proceeding in Contests Initiated Upon a Report by a Representative of the

General Land Office", 44 L.D. 572. The Commissioner and the Register named as contestees in the contests persons they regarded as being the then owners of the mining claims and purported to effect service of contest upon these contestees. In 1928 the Commissioner entered default judgments in Contests Nos. 11,757, 11,759, and 11,761 purporting to declare the mining claims null and void for failure to perform annual assessment work.

8. In the first case brought in the courts to challenge the authority and jurisdiction of the Interior Department to inquire on behalf of the United States whether annual assessment work had been performed for the benefit of a mining claim, the Supreme Court of the United States held in Wilbur v. Krushnic, 280 U.S. 306 (1930), that failure to do annual assessment work did not authorize the defendant's predecessors in office to declare mining claims null and void.

9. On or about June 7, 1930, the defendant's predecessor in office, as a result of the decision in Wilbur v. Krushnic, supra, acknowledged the invalidity and nullity of all prior contests in which the United States had charged only failure to perform assessment work, including Contests Nos. 11,757, 11,759, and 11,761, and instructed his subordinates to renew contest proceedings against the mining claims referred to in Paragraph 5 above.

10. Thereafter, the Commissioner and the Register renewed Contests Nos. 11,757, 11,759, and 11,761. The only difference between the original and the renewed contest proceedings was that in the latter the charge of failure to perform assessment work was expanded to include a charge that performance of assessment work had not been resumed prior to the assertion of challenges to the [5] claims by the defendant's predecessor in office.

11. The Commissioner and the Register prepared new notices of contest, naming as contestees persons they apparently thought owned the above mining claims. The renewed proceedings were also purportedly conducted pursuant to Department Circular No. 460. The Register purported to effect service of notice of contest upon persons he regarded as being the then owners of the mining

claims referred to in Paragraph 5 above, and in 1930 and 1931 the Commissioner from time to time declared that, either to the extent of the interest of the contestees served in Contests Nos. 11,757, 11,759 and 11,761 or in their entirety, the mining claims referred to in Paragraph 5 above were null and void for failure to perform assessment work.

12. In the first case brought in the courts to challenge the authority and jurisdiction of the Interior Department to conduct the renewed contest proceedings, the Supreme Court of the United States in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935), held that no charge of failure to perform assessment work, regardless whether performance of the work had been resumed, could serve as a basis for invalidating mining claims, and that the Department's renewed challenges of oil shale claims for failure to perform assessment work, its institution and conduct of contests based on failure to perform assessment work, and its decisions, such as those in Contests Nos. 11,757, 11,759, and 11,761, declaring claims null and void for failure to perform assessment work, went beyond the authority conferred by law upon the defendant's predecessors in office.

13. Following the decision in Ickes v. Virginia-Colorado Development Corp., supra, defendant's predecessor in office decided and declared that all prior decisions declaring mining claims null and void for failure to perform assessment work, including all the [6] decisions in Contests 11,757, 11,759, and 11,761, were null and void and had no effect upon the validity of mining claims. Such decision was publicly evidenced by, among other things, the Department's decision in The Oil Shale Co., 55 I.D. 287 (1935) (annexed as Exhibit A hereto and made a part hereof) overruling all decisions holding the Department had jurisdiction to challenge mining claims for non-performance of assessment work and expressly recalling and vacating the Departmental instructions authorizing the renewal of assessment work contests following the decision in Wilbur v. Krushnic, supra, in 1930. Pursuant to these decisions, Contests 11,757, 11,759, and 11,761 were dismissed and closed adversely to the United States.

14. At no time prior to the termination of Contests Nos. 11,757, 11,759, and 11,761 had any of the owners of the above mining claims or anyone else made application to the defendant's predecessors in office for patents for the claims or for any other interest in the lands covered by the claims. Defendant's predecessors in office and their subordinates were therefore without authority of law to enter upon said contest inquiries into the validity of any mining claims to such lands, and the Commissioner's decisions in Contests Nos. 11,757, 11,759, and 11,761 were and are invalid.

15. The defendant and his predecessors in office have at all times lacked authority to inquire or decide whether assessment work has been performed. Consequently the actions of the defendant and his predecessors in office in instituting the Contests Nos. 11,757, 11,759, and 11,761 and in purporting to cancel the mining claims referred to in Paragraph 5 above for failure to perform assessment work were and are null and void and of no force or effect.

16. At no time during the Contests Nos. 11,757, 11,759, and 11,761 did the defendant's predecessors in office or their agents [7] serve the contestees personally with notice of contest or follow the applicable Departmental procedures for service of notice of contest, which were set out in Circular No. 460. No contestees ever entered an appearance in the contests. At no time did the Department obtain personal jurisdiction over the contestees in the said contests, and the decisions in the said contests were and are of no force and effect.

17. In originally bringing and subsequently renewing Contests Nos. 11,757, 11,759, and 11,761, the defendant's predecessors in office failed and neglected to name as contestees or to effect service upon all of the then owners of the mining claims involved in the said contests. All contestees and all the then co-owners of the said mining claims were indispensable parties without whose presence no valid judgment or decision in said contests affecting said claims could be entered.

18. The Commissioner's decisions, which were based on an erroneous legal premise, became ripe for purposes

of judicial review when the time allowed for appeal to the Secretary expired. Thereupon they became, and are now, subject to judicial correction if in fact they have not already been nullified by administrative action.

19. After Wilbur v. Krushnic, supra, in 1930, and again after the 1935 decision in Ickes v. Virginia-Colorado Development Corp., supra, the defendant's predecessors in office decided that all prior decisions invalidating oil shale claims for failure to perform assessment work, including all the decisions by the Commissioner in Contests Nos. 11,757, 11,759, and 11,761 were null and void and had no effect on such claims.

20. During the period 1935 through 1962, the defendant, his predecessors in office and officials and employees of the Department of the Interior repeatedly and publicly affirmed that [8] the decisions in the assessment work contest proceedings, including Contests Nos. 11,757, 11,-759, and 11,761, were void and of no effect and did not operate to invalidate or otherwise adversely affect the interests of the plaintiffs, their predecessors in interest and others similarly situated.

21. During the period 1935-1962, the defendant and his predecessors in office issued land patents covering at least 74,000 acres of oil shale claims which had been declared null and void in assessment work proceedings such as those here involved and which were in all respects of fact and law the same as the mining claims referred to in Paragraph 5 above, with full knowledge that such contest proceedings had resulted in decisions adverse to the claims, and in recognition of the invalidity of the prior contest proceedings. The Department's consistent practice of issuing patents for oil shale claims which had purportedly been invalidated by assessment work proceedings was widely known throughout the area in which the claims were located, and was known both to the plaintiffs and to their predecessors in interest.

22. By reason of the facts set forth in Paragraph 19, 20, and 21 above, the Department has duly adopted a rule of law, which cannot be retroactively altered, that the assessment work contests, including Contests Nos. 11,757, 11,759 and 11,761, had no effect on the validity of mining claims.

23. From 1935 until 1962, the plaintiffs or their predecessors in interest both knew of and relied upon the consistent policy of the defendant and his predecessors in office of treating the decisions in the original and the renewed assessment work contests, including the decisions in Contests Nos. 11,757, 11,759 and 11,761, as nullities with no force and effect. During that period the defendant and his predecessors, through their authorized subordinates, made repeated representations to the [9] plaintiffs, their predecessors in interests, their representatives, advisers, and neighbors, that the assessment work contests had no effect on the validity of mining claims, and the plaintiffs have justifiably relied upon such representations in the expenditure of time and money in acquiring, improving, and perfecting their rights to the mining claims set out in Paragraph 5 above.

24. On February 16, 1962, the Manager of the Colorado Land Office of the Bureau of Land Management issued decisions rejecting patent applications for mining claims which, while not involved in this Complaint, were subject to contest proceedings prior to 1935 based upon charges identical with those made by defendant's predecessors in office in Contests Nos. 11,757, 11,759 and 11,761. The Manager's decisions for the first time asserted on behalf of the defendant that decisions in the old assessment work contests barred the patenting of the mining claims involved in such contests.

25. On appeal from the Manager's decisions, the Solicitor of the Department of the Interior, acting pursuant to the direction and with the express authorization of the defendant, ruled on April 17, 1964, that, although the decisions in the old contest proceedings were erroneous in law, the defendant would now and in the future assert decisions in the assessment work contests such as Contests Nos. 11,757, 11,759 and 11,761 to bar the patenting of mining claims provided only that notice of contest had been properly served therein.

26. Since 1930 and 1935, the defendant and his predecessors in office have treated the decisions in the old assessment work proceedings identical with Contests Nos. 11,757, 11,759, and 11,761 as nullities. The arbitrary

and unreasonable change of position by the defendant on April 17, 1964, pursuant to which legally erroneous and long overruled decisions in old contest [10] proceedings are now for the first time being asserted to defeat the vested property rights of the plaintiffs, violates the duty owed by the defendant to the plaintiffs fairly and equitably to administer the statutes of the United States relating to public lands and the rules and regulations of the Department of the Interior.

27. The defendant has a duty to the plaintiffs to withdraw and expunge from the Department of the Interior land records the erroneous decisions in Contests Nos. 11,757, 11,759, and 11,761, which purportedly now bar the patenting of the mining claims set out in Paragraph 5 above by the plaintiffs. The resurrection by the defendant and his subordinates of the erroneous decisions in old contest proceedings, including the decisions in Contests Nos. 11,757, 11,759 and 11,761, casts a serious cloud upon the validity of the plaintiffs' mining claims and have directly and adversely affected the vested property rights of the plaintiffs; and the defendant should be restrained from now asserting the validity or effect of the erroneous decisions in Contests Nos. 11,757, 11,759 and 11,761.

Second Claim

28. This is a suit under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, to obtain a declaration of rights and other legal relations, including a declaratory judgment or decree herein, an order for injunctive relief and for such other and further relief as may be necessary or proper. A case of actual controversy exists between plaintiffs and defendant which is definite, concrete, real and substantial and which touches the legal relations of plaintiffs and defendant. The controversy between the parties concerns the interpretation and the application of the mining laws of the United States, including 30 U.S.C. [11] §§ 22-38, and the validity and effect on plaintiffs' vested rights in oil shale claims of decisions made by the defendant and his predecessors in office and their subordinates in assessment work con-

tests purportedly administering and interpreting said laws. This case of actual controversy admits of an immediate and definitive determination of the legal rights of the parties and admits a specific relief through final decree, as hereinafter more fully appears. The matter in controversy exceeds the sum of $10,000, exclusive of costs. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331.

29. Plaintiffs repeat and reallege each and every allegation of Paragraphs numbered 1, 2 and 5 through 27 of the Complaint with the same force and effect as if they were fully set forth herein.

30. Plaintiffs are subjected to and threatened with an absolute bar, based upon the invalid assessment work decisions in Contests Nos. 11,757, 11,759 and 11,761 as given new effect by the defendant on April 17, 1964, in securing patents to land in which they have vested rights pursuant to the mining laws of the United States.

31. Plaintiffs' property rights in and to such mining claims have been and will continue to be seriously and adversely affected by the defendant's action in asserting that the prior decisions in the assessment work contests, including Contests Nos. 11,757, 11,759, and 11,761, destroyed the mining claims involved therein, including those owned by the plaintiffs.

32. Plaintiffs' injuries, actual and potential, will continue to occur and exist, and the injuries, doubts and uncertainties raised by the defendants' decisions of April 17, 1964, will continue to exist until this Court settles the aforementioned controversy and grants plaintiffs the relief they seek.

[12] 33. The Plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs pray the Court:

1. To issue its mandatory order compelling the defendant to perform the duty owed to the plaintiffs by recalling, vacating, and expunging from the records of the Department of the Interior any decisions, orders, judgments or cancellations entered by the defendant or his predecessors in office or their subordinates in Contests

Nos. 11,757, 11,759, and 11,761 with respect to the mining claims of the plaintiffs.

2. To adjudge that any decisions, orders, judgments or cancellations entered by the defendant or his predecessors in office in Contests Nos. 11,757, 11,759, and 11,761 are erroneous, invalid and of no force or effect on the mining claims involved therein and now owned by the plaintiffs.

3. To adjudge that the defendant be restrained from asserting the validity or effect of the decisions in Contests Nos. 11,757, 11,759, and 11,761 to bar the patenting by the plaintiffs of the mining claims referred to in Paragraph 5 of this complaint.

4. To issue such other restraining orders, temporary injunctions, and permanent injunctions as may be required to protect the statutory and constitutional rights of plaintiffs, preserve the jurisdiction of the Court, and assure the due and fair administration of justice.

5. To grant such other and further relief as the Court deems reasonable, just and proper.

Dated: Denver, Colorado July 10, 1964

Tweedy, Mosley, Sullivan & Young

By John B. Tweedy
Attorneys for Plaintiffs

Cleary, Gottlieb, Steen & Hamilton New York, New York 10005 Of Counsel

Filed July 10, 1964

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[19]

Defendant's Motion To Dismiss

Defendant Stewart L. Udall, Secretary of the Interior, by his attorneys, Lawrence M. Henry, Esquire, United States Attorney, and David Shedroff, Esquire, Assistant United States Attorney, moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.
2. To dismiss the action on the grounds that it is prematurely filed and that plaintiffs have not exhausted their administrative remedies.
3. To dismiss the action on the grounds that defendant has primary authority to determine what conditions bar the patenting of mining claims and this Court has no jurisdiction to grant either declaratory or injunctive relief with respect to the issuance of a mining patent where no application therefor has been submitted to defendant and where legal title to the land remains in the United States.
4. To dismiss the action on the ground that the United States is an indispensable party.

Lawrence M. Henry
United States Attorney

By: David Shedroff
Assistant United States Attorney
Denver, Colorado 80201
Attorney for Defendant

Filed September 30, 1964

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* * * *

[29] ANSWER

Defendant Stewart L. Udall, Secretary of the Interior, by his attorneys, Lawrence M. Henry, United States Attorney, and David I. Shedroff, Assistant United States Attorney, for his answer says:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The United States, a sovereign not amenable to suit, is an indispensable party.

Third Defense

Plaintiffs have failed to exhaust their administrative remedies and lack standing to sue.

Fourth Defense

As a result of notices by the holder of oil and gas leases Colorado 03189-A, 03190-B and 03191-A, published pursuant to Section 7 of the Act of August 13, 1954, 68 Stat. 708, 30 U.S.C. sec. 527, and as a result of the verified statement filed pursuant to the provisions of that Act by Energy Resources Technology Land, Inc., there remains pending in the Department of the Interior a proceeding involving the [30] validity of the so-called unpatented oil shale placer claims designated as Bute Nos. 5 to 8, 13 to 16, 21 to 24 and 30, 31 and 32, all of which are referred to in paragraph 5 of the complaint in this proceeding. The verified statement as to these claims was rejected by the Manager of the Denver Land Office on March 27, 1963, and an appeal was filed by Energy Resources Technology Land, Inc., on April 26, 1963, and that appeal remains pending in the office of the defendant.

Fifth Defense

First Claim

I. Defendant admits the allegations in paragraphs 1 and 2 of the complaint.

II. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegation in paragraph 3 that the matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000. The remaining allegations in paragraph 3 and the allegations in paragraph 4 are conclusions of law which require no answer.

III. With respect to the allegations in the first four sentences of paragraph 5, defendant states that the mining claims listed therein, having previously been declared null and void, are no longer capable of ownership. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in these four sentences. Defendant admits that the claims, when originally located, were situated in the areas described in sentences 5, 6 and 7 of paragraph 5 and that the claims, as originally located, were situated [31] in Rio Blanco County, Colorado. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegation that these claims contain valuable deposits of oil shale.

IV. With respect to the allegations in paragraph 6, defendant admits that in 1927 officials of the general Land Office instituted Contests Nos. 11,757, 11,759 and 11,761 wherein the validity of the mining claims described in paragraph 5 of the complaint was challenged on the ground that annual assessment work in the amount of $100 had not been performed. Defendant denies that these claims represented vested rights of the plaintiffs or their predecessors in interest.

V. With respect to the allegations in paragraph 7, defendant admits that the contest proceedings were conducted pursuant to departmental Circular No. 460 by the Commissioner of the General Land Office and that in 1928 default judgments were entered in Contests Nos. 11,757, 11,759 and 11,761 declaring the mining claims

null and void. Defendant is without information sufficient to form a belief with respect to whether the persons named or served in those contests were the persons that the Commissioner and the Register regarded as being the then owners of the mining claims.

VI. With respect to the allegations in paragraph 8, defendant says that the decision of the Supreme Court in Wilbur v. Krushnic, 280 U.S. 306, speaks for itself. Defendant is without information sufficient to form a belief as to the truth or falsity of the allegation that this was the first case.

[32] VII. Defendant denies the allegations in paragraph 9, except the allegation that orders were issued to renew contest proceedings against the mining claims referred to in paragraph 5 of the complaint.

VIII. Defendant admits the allegations in paragraph 10.

IX. With respect to the allegations in paragraph 11, defendant admits that contest proceedings were conducted pursuant to departmental Circular No. 460, admits that service was effected on the owners of the mining claims and admits that in 1930 and 1931 the Commissioner of the General Land Office entered default judgments declaring the mining claims referred to in paragraph 5 of the complaint null and void. Defendant denies the allegations in paragraph 11 not herein specifically admitted.

X. With respect to the allegations in paragraph 12, defendant says that the decision of the Supreme Court in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, speaks for itself. Defendant specifically denies that the Supreme Court held in that decision that the contest proceedings therein involved went beyond the jurisdiction of the Department of the Interior although it was held that the contest proceedings had been erroneously decided.

XI. Defendant denies the allegations in paragraph 13 of the complaint.

XII. Defendant admits the allegations in the first sentence of paragraph 14 and denies the allegations in the second sentence of that paragraph.

[33] XIII. Defendant denies the allegations in paragraph 15 of the complaint.

XIV. Defendant denies the allegations in the first and third sentences of paragraph 16 and admits the allegations in the second sentence of that paragraph.

XV. With respect to the allegations in the first sentence of paragraph 17, defendant says that the records of the Department of the Interior indicate that service was made on the contestees in Contests Nos. 11,757, 11,759 and 11,761 and that the known owners of the mining claims were named as contestees. The allegations in the first sentence of paragraph 17 are therefore denied. In his decision in a separate case involving other oil shale mining claims, Union Oil Co. of California, et al., 71 I.D. 169 (1964), defendant has held that questions claimants might wish to raise with respect to the legal adequacy of service in earlier contests will be reviewed upon the filing of a proper application with defendant. Defendant denies the allegations in the second sentence of paragraph 17.

XVI. With respect to the allegations in paragraph 18, defendant says that plaintiffs' alleged predecessors in interest failed to appeal to the Secretary of the Interior within the time permitted by the then existing regulation and thus failed to exhaust their administrative remedies. Defendant denies the allegations in the second sentence of paragraph 18.

XVII. Defendant denies the allegations in paragraph 19 of the complaint.

[34] XVIII. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in paragraph 20 as they refer to individuals other than the defendant. As applied to the defendant, the allegations in that paragraph are denied.

XIX. As they relate to defendant, the allegations in paragraph 21 are denied. Defendant admits that his predecessors issued some patents based on oil shale placer claims which had previously been declared null and void for failure to perform assessment work. Defendant is without information sufficient to form a belief with respect to the acreage involved in such patents or what

knowledge his predecessors might have had of the contest proceedings. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in the last sentence of paragraph 21.

XX. Defendant denies the allegations in paragraph 22 of the complaint.

XXI. As they relate to defendant and his authorized subordinates, the allegations in paragraph 23 are denied. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in this paragraph as they relate to other persons. Defendant notes that despite the length of the complaint it contains no allegation as to the dates on which plaintiffs purchased the alleged interests of the locators or the manner in which they were acquired.

XXII. With respect to the allegations in paragraphs 24 and 25, defendant admits that the so-called Union Oil Co. of California decision, 71 I.D. 169, was announced on April 17, 1964. Defendant says that this decision speaks for itself and any paraphrase thereof in paragraph 25 is denied. Defendant admits that this decision did not involve the mining claims described in paragraph 5 of the complaint. The allegations in the last sentence of paragraph 24 are denied.

[35] XXIII. The allegations in paragraphs 26 and 27 of the complaint are denied.

Second Claim

XXIV. With respect to the allegations in paragraph 28, defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegation that the matter in controversy exceeds the sum of $10,000, exclusive of costs. The remaining allegations in paragraph 28 are conclusions of law which require no answer.

XXV. With respect to the allegations in paragraph 29, defendant adopts his answers to paragraphs 1, 2 and 5 through 27 of the complaint.

XXVI. Defendant denies the allegations in paragraphs 30, 31, 32 and 33 of the complaint.

Sixth Defense

The oil shale placer mining claims referred to in the complaint were originally located in 1920 or earlier years. These claims were held null and void in 1930 and 1931. No action was taken thereafter by plaintiffs' predecessors in title or by plaintiffs to challenge the decisions. In the meantime, the United States, relying on the established invalidity of the claims, entered into oil and gas leases covering much of the area involved and otherwise administered the property as being free and clear of plaintiffs' claims. In view of the foregoing, plaintiffs, under ordinary principles of laches and estoppel, are estopped to maintain the present suit.

Wherefore, defendant demands that the complaint be dismissed.

Lawrence M. Henry
United States Attorney

David I. Shedroff
Assistant United States Attorney

Thomas L. McKevitt
Attorney, Department of Justice
Washington, D. C. 20530
Attorneys for Defendant

Filed December 7, 1964

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[108] DEFENDANT'S PRE-TRIAL STATEMENT

I. Statement Of Facts

This suit involves oil shale claims located on public lands by unnamed individuals on undisclosed dates—presumably prior to 1920. In 1930 and 1931, in Contest numbers 11757, 11759 and 11761, the Commissioner of the then General Land Office declared the claims involved here null and void for failure to perform assessment work or to resume assessment work prior to institution of the contests. No appeals from these decisions were taken to the Secretary of the Interior. The plaintiff Energy Resources Technology Land, Inc., asserting that it is the assignee or successor in interest to the original locators, and the plaintiff Oil Shale Corporation, alleging that it has an option to purchase the "claims," instituted this suit on July 10, 1964, seeking judicial review of the decisions of the Commissioner handed down in 1931 and 1932 declaring the claims null and void. Neither of the plaintiffs has applied to the defendant for issuance of a patent or for review of the decisions of defendant's predecessor.

II. Witnesses

Because this is allegedly a suit to review the 1931 and 1932 decisions of an administrative officer, it is defendant's contention that the suit must be tried on the basis of the administrative record. Accordingly, it is not contemplated that any witnesses will be called on behalf of defendant. However, should the plaintiffs be permitted to submit de novo testimony, the defendant may ask authority to call witnesses to meet such testimony.

III. Documentary Evidence

The burden of submitting the administrative record is on the plaintiffs. However, the defendant will be prepared to submit the following:

[109] 1. The departmental files relating to Contests numbers 11757, 11759 and 11761.

The Court has already directed that additional documents may be designated up to twenty days before trial.

IV. Contentions

Defendant's Statement of Contested Issues.

The defendant does not believe that there are any relevant contested factual issues, other than the issue of plaintiffs' standing to sue. The case involves questions of law. However, the plaintiffs, in their complaint, contend that, after 1935, the decisions declaring the claims void were cancelled. This is denied. Plaintiffs also contend that after the decisions in the Krushnic and Virginia Development cases a number of patents were issued to other parties whose claims had been previously rejected for failure to do assessment work. This is conceded although the number of patents in this category is not known. Plaintiffs also contend that the Department of the Interior developed a policy of conceding that all earlier adjudications declaring claims invalid for failure to do assessment work are null and void. This is denied.

Defendant's Statement of Legal Issues.

1. Whether the Department of the Interior had subject-matter jurisdiction to render the cancellation decisions in Contests numbers 11757, 11759 and 11761.

2. Whether said contest decisions were correct on the merits notwithstanding the decisions in Wilbur v. Krushnic, 280 U. S. 306, and Ickes v. Virginia-Colorado Development Corp., 295 U. S. 639.

3. Whether the plaintiffs are barred by laches and estoppel due to failure of (a) the original owners of the claim to exhaust their administrative remedies in the original contest and failure of (b) the plaintiffs in this action to first exhaust administrative remedies by applying for a patent or otherwise seeking administrative review by the defendant of the earlier decisions of his predecessor. Whether the plaintiffs are barred from main-

taining this action by reason of the applicable Colorado statute of limitations.

[110] 4. Whether the plaintiffs have any interest in the claim and, if so, whether any relief can be obtained going beyond their interest. Defendant recognizes that the question of capacity to sue is normally a threshold question rather than a substantive one. In this case, however, the complaint questions the "assessment work" proceedings per se, and in addition, in paragraph 17 questions service of process in those proceedings. Because of this, and without interfering with the defendant's jurisdiction, within the Department of the Interior, as explained in paragraph 5, infra, defendant is entitled to all information which goes to the propriety of the "paper" title.

5. Whether, even if plaintiffs can establish a title to the claims, the Court is limited to a review of the Secretary's jurisdiction to issue the 1931 and 1932 determinations in the contest proceedings. Defendant contends that this Court could not, in any event, direct the issuance of patents and in so doing pass upon the validity of the claims on grounds that have not as yet been considered by the Department of the Interior. Such matters include the validity of the discovery, the factual issue of abandonment and the proper location of the claims as bona fide association placers.

6. Whether this case can be tried de novo or whether judicial review must be limited to the administrative record before the Department of the Interior.

7. Whether the United States is an indispensable party in all proceedings.

8. Whether, even if some officials of the United States may have publicly announced or acted in a manner which indicated they believed all decisions declaring claims invalid for failure to do assessment work were null and void, such announcements or actions create a rule of

property or constitute an estoppel against the United States. United States v. California, 332 U. S. 19, 39.

Respectfully submitted,

Lawrence M. Henry
United States Attorney for
the District of Colorado.

By David I. Shedroff
Assistant United States
Attorney.
Attorneys for Defendant.

Filed November 8, 1965

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[409] Messrs. Tweedy, Mosley, Aley & Young, Attorneys at Law, * * * Denver, Colorado, for Plaintiffs in Civil Actions Nos. 8680 and 9202. Messrs. Cleary, Gottlieb, Steen & Hamilton, * * * New York, New York, Of Counsel in Civil Actions Nos. 8680 and 9202; Fred M. Winner, Esquire, * * * Denver, Colorado, Of Counsel in Civil Action No. 8680.

Mr. Edward N. Juhan, Attorney at Law, * * * Denver, Colorado, and Mr. Fred M. Winner, Attorney at Law, * * * Denver, Colorado, for Plaintiffs in Civil Action No. 8685.

Messrs. Schmidt and Van Cise, Attorneys at Law, Richard L. Eason, Esquire, * * * Denver, Colorado, for Plaintiffs in Civil Action No. 8691.

Mr. Lawrence M. Henry, United States Attorney for the District of Colorado, * * * Denver, Colorado; Mr. David I. Shedroff, Assistant United States Attorney, Denver, Colorado; Mr. Thomas L. McKevitt, Attorney, Department of Justice, Washington, D. C. for Stewart L. Udall, Secretary of the Interior; Mr. Robert M. Mesch, Attorney, Office of Regional Solicitor, Department of the

Interior, Denver, Colorado, and Mr. Lowell Madsen, Attorney, Office of Regional Solicitor, Department of the Interior, Denver, Colorado, Of Counsel for Defendant in all actions.

MEMORANDUM OPINION AND ORDER

Doyle, Judge.

[410] The four above-named actions arise under the Constitution and laws of the United States. Plaintiffs in all four actions seek an adjudication that certain decisions of the Department of the Interior, hereinafter the Department, regarding oil shale placer mining claims in Colorado are erroneous, invalid and without force and effect. Plaintiffs in Civil Action Nos. 8685, 8691 and 9202 seek mandatory orders to compel the Department to issue patents on several placer claims pursuant to certain applications filed by plaintiffs. Plaintiffs in Civil Action No. 8680 have not filed a patent application, but seek a declaratory judgment regarding their alleged rights to gain patents from the Department on several of the Colorado oil shale mining claims. The trial was to the Court. Extensive trial and post-trial briefs have been filed, voluminous exhibits have been received in evidence, and oral arguments have been presented. The case now stands submitted.

There are few factual disputes. Most of the controversy concerns the policies of the Department and certain Supreme Court decisions relating to extensive oil shale reserves in Colorado, Utah and Wyoming. For the sake of clarity, the position of the plaintiffs in each of the consolidated cases will be summarized at the outset. The specific facts surrounding the claims in the several actions are related so as to clarify the issues and furnish basis for the decisions.

[411] Civil Action No. 8680

Plaintiffs, The Oil Shale Corporation and Energy Resources Technology Corporation, Inc. are, respectively, Nevada and Colorado corporations. Energy Resources allegedly owns certain oil shale mining claims, referred

to as the Group A Bute Claims (officially entitled Bute Placer Mining Claims Nos. 1-19, inclusive, 21-28 inclusive, and 30-32 inclusive). The Oil Shale Corporation allegedly owns the Group B Bute Claims (officially entitled Bute Placer Mining Claims Nos. 33-48, inclusive), the Camp Bird Claims (officially entitled Camp Bird Placer Mining Claims Nos. 1-20, inclusive) and the Atlas Claims (officially, the Atlas Placer Mining Claims Nos. 1, 2, 3, 7, 9, 10, 12, 17, 18). All of these claims are located in Rio Blanco County, Colorado; all allegedly contian valuable oil deposits.

Plaintiffs trace their interests in these claims through one Tell Ertl who, during the 1950's, acquired them from the original claimants and their successors in interest by purchase and forfeiture proceedings under Title 30 U.S.C. § 28. Hamilton v. Ertl, 146 Colo. 80, 360 P. 2d 660 (1961). All of the claims were allegedly located by the original claimants during December, 1919 and January, 1920. Thus they predate enactment of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, Title 30 U.S.C. § 181, et seq. This act changed the mining law policy in that certain mineral lands were withdrawn from location.

In 1927, the Department instituted certain contest [412] proceedings, Contest Nos. 11,757, 11,759 and 11,761 against the original claimants regarding the above mining claims. On May 4, 1928, the Commissioner, General Land Office, issued letter decisions declaring the claims null and void for the failure of the named contestees to appear upon notice and process purportedly served and answer charges alleging their failure to perform annual assessment work for the years ending July 1, 1921 to 1927, inclusive, as required by 30 U.S.C. § 28.

Plaintiffs contend that the Supreme Court has, on two occasions, held that the Department lacked authority to declare mining claims null and void for failure to perform annual assessment work. Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 50 S. Ct. 103 (1930); Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639, 55 S. Ct. 888 (1935). Their further contention is that in any event the contestees were not given proper

notice of the contest proceedings. They allege that following the Supreme Court's divisions in Wilbur v. Krushnic, supra, and Ickes v. Virginia-Colorado Development Corporation, supra, the defendant's predecessors in office and various officials and employees of the Department repeatedly and publicly affirmed that the decisions in the assessment work contest proceedings, including Contests Nos. 11,757, 11,759 and 11,761, were null and void; that from 1935 until 1962, the defendant and his predecessors in office issued land patents covering at least 74,000 acres of oil shale claims which had been declared null and void in assessment work [413] proceedings such as those here involved, and which were in all respects of fact and law the same as the mining claims referred to above in which plaintiffs allege to have an interest. Plaintiffs argue that by reason of these acts the Department has adopted a rule of law, which cannot be retroactively altered, that the assessment work contests had no effect on the validity of mining claims. It is further alleged that the plaintiffs and their predecessors in interest have relied upon the rule of law purportedly adopted by the Department.

In 1962, plaintiff Energy Resources and others applied for patents on certain mining claims which had been the subject of departmental contest proceedings during 1930-1933 involving issues identical to those raised in Contest Nos. 11,757, 11,759 and 11,761. On February 16, 1962, the Manager of the Colorado Land Office, Bureau of Land Management, issued an opinion rejecting the applications on the ground that while the original cancellations may have been erroneous as a matter of law at the time they were made, the principles of finality of administrative action, estoppel by adjudication, and res judicata prevent their now being challenged and consequently bar the patenting of such claims. The Manager's decision was affirmed by the Solicitor of the Department on April 17, 1964. Union Oil Company of California, et al., 71 I.D. 169 (1964). The plaintiffs assert that they have exhausted their administrative remedies and that the case is now ready for judicial review. They seek a mandatory injunction compelling the Department to expunge from Department re- [414] cords any decisions, orders,

judgments or cancellations entered with respect to the mining claims of plaintiffs in Contests Nos. 11,757, 11,759 and 11,761. They also seek a declaratory judgment declaring such contest proceedings to be of no effect, and an injunction barring the Department from relying upon them to bar their patent applications, and any further relief appropriate.

Civil Action No. 8685

Plaintiffs Umpleby, a Texas citizen, and Wasatch Development Company, a Colorado corporation, seek similar relief in regard to certain mining claims in Garfield County, Colorado, known as the Carbon and Elizabeth claims. Plaintiff Umpleby is a successor in interest from the original claimants and the alleged owner of an undivided thirteen and one-half per cent interest in the unpatented Carbon Nos. 1 through 6 and Elizabeth Nos. 1 through 12 oil shale placer mining claims. Plaintiff Wasatch Development Company is a successor in interest from the original claimants and the alleged owner of an undivided eighty-six and one-half percent interest in these claims. The claims were allegedly located in 1918, prior to the enactment of the Mineral Leasing Act.

These claims were also the subject of a contest proceeding, Contest No. 12029, initiated by the Department against Umpleby and others in 1929, in which they were declared invalid for failure to perform annual assessment work. On September 8, 1959, plaintiffs filed application for mineral patent (Colo. 030979) on the Carbon Nos. 1 through 4 and Elizabeth Nos. 1, 2, 4 through 12 claims. [415] In Union Oil Company of California, et al., supra, the Land Office Manager's rejection of this patent application was affirmed by the Solicitor. Plaintiffs make assertions similar to those made by plaintiffs in Civil Action No. 8680. They seek a declaration that the Union Oil Company decision is void because of the Supreme Court's decisions in Wilbur v. Krushnic, supra, and Ickes v. Virginia-Colorado Development Corporation, supra, and the Department's subsequent affirmance thereof, and pray for a mandatory injunction compelling the Depart-

ment to take such action as is necessary to issue patents to them.

Civil Action No. 8691

In this action, plaintiffs Napier and Grace Savage are California citizens, and plaintiffs Joan Savage, M. B. Farnum, Catlin, W. H. Farnum, J. R. Farnum, John Savage and Mincer are Colorado citizens. Plaintiffs are successors in interest and the alleged owners of three oil shale placer mining claims in Garfield County, Colorado, known as the Northwest, Northeast and Southeast claims. These claims were allegedly located by plaintiffs' predecessors in 1918, prior to the enactment of the Mineral Leasing Act. They also were the subject of a contest proceeding, Contest No. 12972, initiated by the Department in 1931, wherein the claims were declared invalid for failure to perform annual assessment work. On June 1, 1959, the plaintiffs applied for a patent on the claims involved here. This application was also rejected by the Manager of the Colorado Land Office and affirmed by the Solicitor, Union Oil Company of Cali- [416] fornia, et al., supra. Plaintiffs also contend that this decision is contrary to law and the settled practice of the Department. They seek a mandatory injunction compelling the Department to take such action as is necessary to issue the patents applied for, and a judgment declaring the departmental decisions adversely affecting their claims to be null and void, and other appropriate relief.

Civil Action No. 9202

Plaintiff Brown is a Colorado citizen, and is the successor in interest and the alleged owner of certain oil shale placer mining claims in Garfield County, Colorado, known as the Oyler claims (officially the Oyler Oil Shale Placer Mining Claims Nos. 1-4). Plaintiff The Oil Shale Corporation is a Nevada corporation holding a lease and option to purchase the Oyler claims. The Oyler claims were allegedly located in 1916, prior to the enactment of the Mineral Leasing Act. They too were the subject of departmental investigations and contest proceedings prior

to the Supreme Court's decision in Ickes v. Virginia-Colorado Development Corporation, supra. The Department concluded from an investigation in 1918 that the claims had been properly located. A second investigation in 1920 affirmed the continued validity of the claims. In 1929, a contest proceeding, Contest No. 12039, similar to those discussed above, resulted in a declaration invalidating the claims for failure to perform annual assessment work. In 1948, the sole surviving directors of the then [417] record title holder of the claims, the Index Shale Oil Company, a dissolved corporation, conveyed the claims to plaintiff Brown and her husband. In 1955, the Browns conveyed the claims to the Pacific Oil Company, which filed a patent application in September of the same year, Colorado No. 012327. This application was also rejected by the Manager of the Colorado Land Office on February 16, 1962, and affirmed by the Solicitor in Union Oil Company of California, et al., supra. Apparently as a result of the Land Office Manager's decision in 1962, the Pacific Oil Company reconveyed the claims to plaintiff Brown. The lease-option agreement with plaintiff The Oil Shale Corporation was executed thereafter. Plaintiffs here make the same assertions and seek similar relief to that asked by plaintiffs in Civil Action No. 8680.

In summary, the plaintiffs assert at least three separate and independent reasons for according the relief sought in these consolidated actions:

1. The 1928-1933 contest proceedings of the Department are void for lack of jurisdiction and can give no basis for the Union Oil decision on any theory.

2. In 1935, the Department adopted a rule that the 1928-1933 contest decisions would be regarded as void and without force and effect and this rule cannot be reversed retroactively.

3. Even if the 1928-1933 decisions are regarded as merely erroneous, but supported by subject matter jurisdiction, the plaintiffs in the circumstances above described can now seek direct review and obtain their reversal.

[418]

The Assessment Work Issue: Departmental View Prior to the Krushnic and Virginia-Colorado Decision

The Department's broad power over the public lands gives it an undisputed jurisdiction over most aspects relating to the validity of mining claims, e.g., marking of claims, discovery, mineral character of the land, particularly when a patent application has been filed. Cameron v. United States, 252 U.S. 450, 40 S.Ct. 410 (1920); Best v. Humboldt Placer Mining Company, 371 U.S. 334, 83 S.Ct. 379 (1963). In view of the scope of its acknowledged powers, the Department has, in recent decades, been reluctant to accept the proposition that it lacks power to question the sufficiency of assessment work performance in order to take possession of claims for the Government where such work is in default.[1] Under the mining laws, the penalty for failure to do assessment work traditionally has been that other private parties are empowered to enter onto the lands and relocate the claim. E.g., Belk v. Meagher, 104 U.S. 279, 26 L.Ed. 736 [419] (1881); Swanson v. Sears, 229 U.S. 180, 32 S. Ct. 455 (1912); Knight v. Flat Top Mining Co., 6 Utah 2d 51, 305 P.2d 503 (1957). Where there are co-owners to a mining claim, one co-owner can, by performing assessment work where the others do not, obtain complete ownership of the claim through forfeiture proceedings under 30 U.S.C.A. § 28. Hamilton v. Ertl, supra. In recent years, the Department has asserted its thesis that relo-

[1] That a distinction has been made between the Department's power to invalidate claims for non-performance of assessment work and its power to do so for other defects is illustrated by the following extract from The Federal Shale Oil Company, 53 I.D. 213, 216 (1930):

"Putting aside for the moment the question, whether departmental authority exists to attack mining claims for failure to do annual work, it can not be disputed that such authority exists to determine whether a valid claim was initiated prior to the date of the act by doing the acts the mining law prescribed, such as marking the boundaries so that they might be readily traced, making a discovery of mineral prior to the act, or thereafter as a result of work diligently in prosecution at its date.

cation for assessment work default is also a remedy available to the Government, and within its jurisdiction. But this has not always been its position.

In an early decision, P. Wolenberg, et al., 29 L.D. 302 (1899), the Secretary of the Interior recognized that the Department had no jurisdiction under the pre-Mineral Leasing Act mining laws to inquire into a charge of failure to perform assessment work. The Secretary reviewed the action of the Land Office Commissioner in ordering a hearing to determine whether annual assessment work had been performed on a contested claim. In vacating the order for a hearing on this question the Secretary made the following comments:

"Ordinarily an order of your office directing a hearing, being an interlocutory proceeding, will not be disturbed upon appeal. Indeed, generally speaking, such an order is not appealable. This rule, however, is not without exception, and where it is made to appear that the order involves matters which the land department can not inquire into. . . the same may be considered and corrected or wholly vacated when brought to the attention of the Department, whether by direct appeal or otherwise.

"In the present case the order for a hearing, in so far as it directs an inquiry into the charge of failure to make an expenditure of one [420] hundred dollars, in labor or improvements, on the Mascot claim during the year 1896, and the alleged relocation of the claim by reason thereof, clearly relates to matters over which the land department is without authority. The annual expenditure of one hundred dollars, in labor or improvements, required by section 2324 of the Revised Statutes, is solely a matter between rival and adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts, and not to the land department. In this respect the requirement made by section 2324 is essentially different from that made by section 2325, which makes the expenditure of five hundred dollars, in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the

Government, the determination of which is committed to the land department. * * *

"The action of your office in ordering a hearing to determine whether the annual assessment work for 1896 had been done upon the Mascot, and, if not, whether work upon that claim had been resumed before the alleged relocation thereof, was erroneous." 29 L.D. at 303-04.

See also Barklage et al. v. Russell, 29 L.D. 401 (1900); Nielson v. Champagne Mining & Milling Co., 29 L.D. 491 (1900); Cain et al. v. Addenda Mining Co. (On Review), 29 L.D. 62 (1899).

Following these early decisions the Department took a different view in cases involving the right of mining claimants to lands subsequently withdrawn or reserved from mining locations. Thus, in Navajo Indian Reservation, 30 L.D. 515 (1901), the Department held that a valid mining location subsisting at the time of the reservation of lands as an Indian Reservation was excepted from the effect of the withdrwal and that such claim was subject to relocation upon failure of the original claimant to perform annual assessment work. The Secretary refused to determine whether the original [421] locators had defaults, and whether the alleged relocators had succeeded to their rights, holding this to be a matter for the courts. However, he did consider the effect of the withdrawal upon the subsequent default of prior claims. Depending upon how the reservation was worded, the Secretary concluded, it might attach upon default of an existing claim so as to prevent relocation or it might never attach, regardless of the subsequent default. If, for example, the reservation did not flatly exclude the prior claims, but merely exempted them for so long as they are properly "maintained," a default in such "maintenance" would bring the land under the withdrawal and hence under the control of the Government.

The effect of a withdrawal under the reclamation act for irrigation works, 32 Stat. 388, was considered in a Departmental Instruction dated January 13, 1904, 32 L.D. 387. The Secretary noted that an unperfected mining claim is merely a possessory right which is liable to be divested for failure to maintain the claim in accord-

ance with the mining laws and local regulations applicable thereto. He then stated that the land department has jurisdiction to determine whether the claimant has defaulted and to declare by its judgment whether such right has been divested so as to restore the land to the control of the Government. A decade later, in E. C. Kinney, 44 L.D. 580 (1916), this principle was followed to support the asserted jurisdiction of the Department to determine whether placer mining claims on withdrawn lands were subsequently defaulted for failure [422] to perform annual assessment work. In referring to the January 13, 1904, Instruction, the Assistant Secretary said:

"This is undoubtedly the true rule, for where a claimant is in default so that his claim could be defeated by another individual adverse claimant, surely the Government, desiring to devote the land to an important public use, may likewise take advantage of the default and divest the claim so as to free the land for Government use." 44 L.D. at 582.

As has been mentioned, the Mineral Leasing Act of 1920 instituted a new policy with respect to certain minerals, including oil shale, by withdrawing them from location and patent. After its enactment, many prior locators ceased doing annual assessment work on claims for minerals included under the Act on the ground that if such claims could no longer be located, neither could they be relocated. An investigation by the Department after the enactment of the Leasing Act showed that work had stopped on many claims. Many contests were initiated alleging that failure to perform the work resulted in forfeiture of the claims to the United States. In bringing these contest proceedings the Department took the position that its jurisdiction to inquire into the validity of mining claims was enhanced by the new policy propounded by the Act. The Department reasoned that the provision of Section 37 of the Act, excepting from its coverage valid existing claims thereafter "maintained in compliance with the laws under which initiated," impliedly gave the Secretary the authority to determine what lands are subject to lease and what lands are within

the exception of valid claims. In the Department's [423] view, maintenance "in compliance with the laws under which initiated" included the performance of annual assessment work; hence, the Secretary's implied authority to determine what claims fell within the exception necessarily gave him jurisdiction to invalidate claims for nonperformance of such work.

The Supreme Court Decisions

The leading Department case enunciating this viewpoint was Emil L. Krushnic, 52 L.D. 295 (1929). There, the petitioner's application in 1922 for patent to certain oil shale placer claims was denied for failure to perform assessment work during 1920, although he had resumed such work in 1921 and 1922. The Commissioner ruled that to maintain a claim "in compliance with the laws under which initiated means, among other things, the performance of $100 worth of annual labor and improvement prescribed by section 2324, Revised Statutes . . .," and that failure to fulfill this requirement automatically terminated the claim and rendered it subject to disposition only under the leasing act. In affirming the Commissioner the Secretary emphasized the automatic nature of the termination upon default in performing the yearly labor.

"Section 37 [of the Leasing Act] at one blow destroyed the right of relocation of such minerals and with it fell the right of resumption. * * * The fair and obvious meaning of section 37 is that if the annual work is not done, all the rights of the claimant are gone."

* * * *

"The contention that the Federal Government must act the part of an adverse claimant in this [424] and similar cases and be alert and vigilant and take some affirmative action to terminate the rights of a defaulting claimant before he resumes work, such as by physical reentry, or institution of adverse proceedings in the department or by bringing an ouster suit in the courts, is untenable." 52 L.D. at 297, 301-03.

Since he viewed the forfeiture to be automatic, immediately vesting the Government with complete control and ownership of the land, the Secretary was able to distinguish between the Department's jurisdiction under the general mining laws to settle disputes over assessment work performance between private adverse claimants and its jurisdiction under the Leasing Act to invalidate claims on its own initiative for failure to perform the annual labor.

"The situation here is entirely different. The leasing act, as stated, repealed as to shale deposits the general provisions of the mining law and withdrew them from location and disposition thereunder and was a legislative assertion of control and ownership thereof by the United States, except as specifically provided in section 37 of the act. It is the duty of the department to scrutinize claims that are asserted to be within the exceptions and ascertain whether the government or the individual has the better right. The question is one of validity, and under section 37 maintenance is an essential element of validity. Only controversies between adverse claimants under conflicting mining locations of the same land, and which relate solely to the right of possession are committed exclusively to the courts. . . ." 52 L.D. at 303.

Following this ruling in Krushnic the land office instituted numerous assessment work contests. Annual Report of the Secretary of the Interior, Fiscal Year 1928, page 11. Included in these proceedings were Contest Nos. 11757, 11759, 11761, 12029 and 12039, regarding the placer claims in Civil Actions Nos. 8680, 8685 and 9202. Meanwhile, however, Krushnic found its [425] way to the Supreme Court. The decision of the Department was there reversed. The Supreme Court ruled that the Secretary's decision that cessation of assessment work automatically terminates the claim "violates the plain words of the excepting clause of the Leasing Act." Wilbur v. United States ex rel. Krushnic, supra, 280 U.S. at 318, 50 S.Ct. at 105. The reasoning was that while performance of annual labor "maintains" a claim,

"the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work,

unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened . . ." 280 U.S. at 317-18, 50 S.Ct. at 105.

Failure to perform assessment work on a claim located prior to the leasing act, the court concluded, only renders it subject to loss by relocation and is without effect so far as the Government is concerned.

"The owner [of a mining claim]i s not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not ipso facto forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.

"Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the Government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted. P. Wolenberg, et al., 29 L.D. 302, 304; Nielsen v. Champagne Mining & M. Co., 29 L.D. 491, 493. 280 U.S. at 317, 50 S.Ct. at 104-05.

[426] The decision in Krushnic did not put at rest the problem of jurisdiction, at least not for the Department. The Department's interpretation was that it prohibited the Government's invalidating mining claims for failure to perform assessment work only where the claimant has resumed the assessment work before "some form of challenge on behalf of the United States to the valid existence of the claim has intervened." [2] The Department then un-

[2] The Federal Shale Oil Co., 53 I.D. 213, 220 (1930). See also, Francis D. Weaver, 53 I.D. 175 (1930), On Rehearing, 53 I.D. 179

dertook to investigate the validity of oil shale claims upon which assessment work had stopped and had not been resumed. It posted a notice on each such claim. This declared that the United States had taken possession of the land for its exclusive use and benefit. Numerous such notices were posted; many contest proceedings were instituted; and many claims covering hundreds of thousands of acres were declared null and void. Annual Report of the Secretary of the Interior, Fiscal Years 1930, p. 14; 1931, p. 65; 1932, pp. 18, 58; 1933, p. 60.

"It is the department's view that a challenge of an oil shale claim which is in default for the nonperformance of assessment work, by notice of the preferment of a charge against the claim to that effect in a proceeding instituted in accordance with the regulations of February 26, 1916, Circular No. 460 (44 L.D. 572), while such default continues to exist, and a judgment by the department that the charge is sustained after due notice and opportunity to be heard, has the same effect in the extinguishment of the claim as would a valid relocation of a mining claim located on account of minerals other than those mentioned in the leasing act." The Federal Shale Oil Company, supra, 53 I.D. at 221.

[427] On April 1, 1933, the Department suspended these actions to await "court decisions on [the] jurisdiction of the Department to challenge the validity of oil shale locations for failure to perform annual labor thereon." Annual Report of the Secretary of the Interior, Fiscal Year 1934, p. 65. The litigation referred to was culminated in the Supreme Court's decision in Ickes v. Virginia-Colorado Development Corporation, supra.

In Virginia-Colorado, the Court reviewed a decree requiring the Secretary of the Interior to vacate certain adverse proceedings together with his decision declaring certain placer claims of the plaintiff in that case to be void. Plaintiff had alleged that he had located oil shale placer claims on mineral lands of the United States in

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(1930); Virginia-Colorado Development Corporation, 53 I.D. 666 (1932); State v. Madell, 53 I.D. 195 (1930); Instructions, Government Proceedings Against Oil Shale Claims for Default in Assessment Work, 53 I.D. 131 (1930).

Colorado in June 1917. Annual assessment work had been performed for each year through July 1, 1930, but none had been done during 1931 when the Department initiated adverse proceedings challenging the claim for nonperformance of the work and failure to resume prior to the contest proceedings.

The Supreme Court affirmed this decree and in so doing the opinion by Mr. Justice Hughes, declared and clarified several points.

First, the decision reaffirmed the holding in Krushnic as to the character of the right acquired. On this it quoted:

[428] "... Restating the rule declared by many decisions, we said in Wilbur v. U.S. ex rel. Krushnic, 280 U.S. 306, 316, 50 S.Ct. 103, 104, 74 L.Ed. 445, that such a location, perfected under the law, 'has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term.' It is alienable, inheritable, and taxable."

Secondly, it again spelled out the extent of the Department's authority as follows:

"There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. [Citing cases]

"The Leasing Act of 1920 inaugurated a new policy. Instead of the acquisition of rights by location, the act provided for leases. But by express provision, the act saved existing valid claims 'thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws.' Section 37 of the act (30 USCA § 193). What then was the status of plaintiff's claims under this exception? They were originally valid claims. No question is raised to the contrary. There is no suggestion of lack of discovery, fraud, or other defect. There is no ground for a charge of abandonment. The allegations of the bill, admitted by the motion to dismiss, dispose of any such contention. Plaintiff had lost no rights by failure to do the annual assessment

work; that failure gave the government no ground of forfeiture. Wilbur v. U.S. ex rel. Krushnic, supra."

Thirdly, it was held that the Saving Clause (Section 37 of the Leasing Act) preserved all rights acquired prior to the enactment of the act, and that the reservation did not enlarge the Department's authority. On this it said:

"In this view, plaintiff came directly within the exception. The government invokes the new policy of the Leasing Act abolishing the practice of location. But the saving provision of section 37 is a part of the policy of the act. Its terms explicitly declare the will of Congress as to valid existing claims, with full understanding of the status of such claims under the prior law.

[429] "The government refers to the reservation in the opinion in Wilbur v. U. S. ex rel. Krushnic, supra, as to the maintenance of a claim by a resumption of work 'unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened.' But that was a reservation, not a decision, and it does not aid the government in its contention here. To be effective, the 'challenge' to the 'valid existence' of a claim must have some proper basis. No such basis is shown.

The Court's conclusion was that "the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law."

Soon after the decision of the Supreme Court in Virgina-Colorado, the Department issued its opinion in The Shale Oil Company, 55 I.D. 287 (1935). This in a sense implemented the Supreme Court's ruling. The appeal to the Secretary was from a Commissioner's denial of patent application. The contention was that the Land Department was without jurisdiction and without legal authority to question a placer claim owner's failure to perform assessment work for any year. The First Assistant Secretary reversed the decision and remanded the case with instructions to reinstate the application and to dispose of it unaffected by default in the performance of assessment labor. In commenting on the Virginia-Colorado opinion the Assistant Secretary noted that "the chal-

lenge to the valid existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings and the decision set forth in the Bill went beyond the authority conferred by law."

The Assistant Secretary went even further; he con- [430] cluded that: "The above-mentioned decisions in the cases of Francis D. Weaver and Federal Oil Shale Company and other departmental decisions in conflict with this decision are hereby overruled."

Thus, the Department not only clearly recognized its lack of authority to deal with the assessment work problem in the case before it, but also it cleared the record by overruling all prior inconsistent decisions.

There are other evidences that this was and continued to be the viewpoint of the Department many, many years following the Virginia-Colorado decisions. The viewpoints of various officials, reflected in the correspondence, show that they believed that prior decisions forfeiting claims for failure to do assessment work were void.[3]

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[3] Letter of Secretary Lane dated October 23, 1918:

"I am in receipt of your letter dated October 2, 1918, and making inquiry as to the necessity for performing annual assessment work on some oil shale lands in Wyoming, which you and associates are claiming under placer mining locations made in 1917 and 1918.

* * * *

"As a general rule matters involving questions of assessment work on mining claims arise between adverse claimants to the same mineral land and go only to the right of possession, the determination of which is committed exclusively to the courts."

Letter of First Assistant Secretary Vogelsang dated January 20, 1919:

"The annual expenditure on unpatented mining location required under Section 2324 U.S. Revised Statutes, and commonly called annual assessment work, is, with the exception of certain phosphate locations affected by a special act of Congress, solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts. In other words, the nonperformance of assessment work renders the land subject to adverse relocation provided work is not resumed (40 Stat. 343).

Letter from Commissioner Fred W. Johnson dated June 28, 1935:

"It is possible if you left your claims in 1925 and have not since performed assessment work thereon that they have been relocated,

[431] The regulations governing the Bureau of Land Management recognize this proposition also. See 43 C.F.R. § 3420.4 (1966). It provides:

"The annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes (30 U.S.C. § 28), is, with the exception of certain phosphate placer locations, validated by the act of January 11, 1915 (38 Stat. 792; 30 U.S.C. 131), under which regulations were issued March 31, 1915 (Circ. 396), 44 L.D. 46, solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts." [4]

[432] Similarly, the annual reports of the Secretary of the Interior also reflected the Department's view in this

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but as also stated in the paragraph referred to, 'The determination of the question of the right of possession between rival or adverse claimants to the same mineral land is committed exclusively to the court.' Matters of trespass, thievery, etc., such as those referred to in your letter, are also committed to the jurisdiction of the court, being punishable only under the laws of the state,. As this office has no jurisdiction in the matters mentioned in your letter it will not undertake to advise you in that regard."

Letter from Commissioner Johnson dated July 25, 1935:

"Replying to your letter of July 20, 1935, you are advised that this office has no jurisdiction over questions relating to the performance of annual assessment work on mining claims, such questions being committed exclusively to the courts."

Letter from Under Secretary Chapman dated February 11, 1946:

"The failure to perform the annual assessment work for the benefit of a valid mining location has no effect as against the United States but only renders the claim subject to loss through relocation by another claimant if the work is not commenced or resumed before such relocation. Therefore, the question of whether the work done is of a nature that would be considered assessment work is not one within the jurisdiction of this Department but is for the appropriate court to determine should litigation arise between the claim holder and another claimant making a relocation of the same ground. See Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639.

See also, The Shale Oil Company, supra, pp. 20-21.

[4] See also 37 L.D. 757, 769 (1909); 49 L.D. 15, 73 (1922) showing similar versions of the quoted regulation.

regard.[5] Moreover, the commentators have generally regarded the question as one of jurisdiction.[6]

Union Oil Company Decision

We turn now to consideration of the case which marked a reversal of the Department's viewpoint and attitude. In Union Oil a number of applicants for patents to oil shale placer mining claims which had been declared null and void in the contest proceedings during 1930-1933 sought to have patents issue. The Manager [433] of the Land Office denied these efforts. The Secretary, in his exercise of supervisory jurisdiction, submitted the case to the Solicitor of the Department for final decision. The Manager's decision was, of course, affirmed notwithstanding that the Solicitor recognized the invalidity of the 1930-1933 rulings. He noted that failure to perform annual assessment work was not a ground for cancellation of oil shale placer claims by the Government. 71 I.D. at 170. He held, however, that even though the original cancellations were incorrect in law, that nevertheless under the principles of finality of administrative action, estoppel by adjudication, and res judicata, these rulings could not be challenged in the year 1962.

The Solicitor's basic assumption in the Union Oil decision was that the Supreme Court had not denied the De-

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[5] See Report of the Secretary of the Interior, Fiscal Year 1934, page 65, and see also the Statement of Secretary Wilbur before the Senate Committee on Public Lands, given on February 12, 1931.

[6] E.g.:

"Assessment work upon oil-shale claims is governed by the rules of the general mining law and the claimant of a valid location prior in time to the passage of the Leasing Act is not subject to any forfeiture that did not apply to such law. In other words, fulfillment of the annual ownership work each year is not a prerequisite to continuing ownership as against the Government of the United States, and, in the absence of an adverse relocation, work may be resumed at any time." Division of Mines, California Department of Natural Resources, American Mining Law, Vol. 1, § 1051 (1943);

"Only a mining relocation can affect forfeiture, and the Federal Government cannot question the failure to perform assessment work." 2 American Law of Mining, § 7.26 (1964).

partment's jurisdiction with respect to the subject matter. He also construed The Shale Oil Company case, supra, which had overruled all inconsistent decisions, as not reinstating the claims previously declared forfeited. In essence, he determined that the applicants were required to take action to nullify these rulings at the time and that their failure to exercise this initiative constituted something in the nature of an implied acquiescence. The important emphasis in the decision was placed on administrative finality and res judicata. Since this decision stands [434] in the way of a recognition of the plaintiffs' rights, we must consider and determine its validity in the light of the Supreme Court decisions and the narrow question is whether the Department had subject matter jurisdiction with respect to performance or nonperformance of assessment work. In support of his holding that there was such jurisdiction, the Solicitor pointed to the language in Virginia-Colorado to the effect that the Secretary had authority by appropriate proceedings to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. From this he concluded that the Department at all times retained jurisdiction; that is, power over these claims. As we view it, this was an unjustified interpretation of the decisions of the Supreme Court. It overlooked the basic nature in terms of property of a mining location. Both Krushnic and Virginia-Colorado proceeded on a fundamental proposition that this creates a vested property right which can be defeated only by a competitor. Historically, this was the nature and character of the mining claim, and to overlook it is to change a fundamental rule of property. No amount of administrative legerdemain can overcome this fundamental principle.

It is, of course, so fundamental as to require no documentation, that an adjudication by a tribunal lacking subject matter jurisdiction is wholly nugatory, need not be appealed, and can not be res judicata. When, as here, the Department acted beyond the authority granted to it by the law, it acted in the particular [435] area beyond its jurisdiction. The Supreme Court told the Depart-

ment this in language as plain as legal language can be. If Krushnic left some unresolved question, Virginia-Colorado did not. It is clear from a reading of this opinion that the Court was speaking on the question of the Department's jurisdiction. As to pre-1920 locations, the Court held that they retained the legal status which they had enjoyed prior to the adoption of the Leasing Act. Both of these cases rule that prior to the adoption of this Act the performance of assessment work was unnecessary to the preservation of the locator's possessory right against the Government.

Virginia-Colorado clarified beyond question the proposition that the Government has never had a possessory right to pre-Leasing Act mining claims defective only for failure to perform assessment work. It follows from this that the Department is wholly without jurisdiction to inquire into the status of assessment work performance.

It is also noteworthy that there has been no contention here that plaintiffs have abandoned their claims and there is a dearth of evidence to establish acquiescence, express or implied, by plaintiffs in any assumption of jurisdiction by the Department.

It follows, therefore, that the decision in Union Oil is contrary to and irreconcilable with the decisions of the Supreme Court of the United States. In so holding we recognize that the Department of the [436] Interior is in good faith advancing a policy. Congress has, of course, granted the Department broad powers to protect public lands and the Department undoubtedly considers itself duty-bound to oppose the instant claims. This Court, however, must follow the law as laid down by the Supreme Court of the United States. It is upon this basis that we conclude that the actions of the Department in assuming jurisdiction over the failure to do assessment work is void and of no effect whatever.

The plaintiffs are directed to submit forms of judgments reflecting the views expressed in this opinion. These judgments should be submitted to defendant for approval as to form.

Dated at Denver, Colorado, this Twenty-first day of December, A. D. 1966.

By The Court:

William E. Doyle, Judge
United States District Court

Filed December 21, 1966

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* * * *

[439] JUDGMENT

This action came on for trial before the Court, Honorable William E. Doyle, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged:

1. That the decisions of the Commissioner of the General Land Office in Contest 11757 dated May 4, 1928, July 3, 1931 and November 3, 1931, and any other decision in that contest, purporting to declare the Bute Placer Mining Claims Nos. 1-19 inclusive, 21-28 inclusive, and 30-48 inclusive null and void for failure to perform annual assessment work, were and are void, invalid and of no force or effect whatever upon the validity of the aforesaid Bute Claims or of any interest or interests in said claims or any of them. In the location certificates the aforesaid Bute Claims are described as comprising the following portions of Township 4 South, Range 96 West of the Sixth Principal Meridian, in Rio Blanco County, Colorado:

[440]

Bute No. 1 Section 12, northeast quarter
Bute No. 2 Section 12, northwest quarter
Bute No. 3 Section 12, southeast quarter
Bute No. 4 Section 12, southwest quarter

Bute No. 5 Section 13, northeast quarter
Bute No. 6 Section 13, northwest quarter
Bute No. 7 Section 13, southeast quarter
Bute No. 8 Section 13, southwest quarter
Bute No. 9 Section 11, northeast quarter
Bute No. 10 Section 11, northwest quarter
Bute No. 11 Section 11, southeast quarter
Bute No. 12 Section 11, southwest quarter
Bute No. 13 Section 14, northeast quarter
Bute No. 14 Section 14, northwest quarter
Bute No. 15 Section 14, southeast quarter
Bute No. 16 Section 14, southwest quarter
Bute No. 17 Section 10, northeast quarter
Bute No. 18 Section 10, northwest quarter
Bute No. 19 Section 10, southeast quarter
Bute No. 21 Section 15, northeast quarter
Bute No. 22 Section 15, northwest quarter
Bute No. 23 Section 15, southeast quarter
Bute No. 24 Section 15, southwest quarter
Bute No. 25 Section 9, northeast quarter
Bute No. 26 Section 9, northwest quarter
Bute No. 27 Section 9, southeast quarter
Bute No. 28 Section 9, southwest quarter
Bute No. 30 Section 16, northwest quarter
Bute No. 31 Section 16, southeast quarter
Bute No. 32 Section 16, southwest quarter
Bute No. 33 Section 8, northeast quarter
Bute No. 34 Section 8, northwest quarter
Bute No. 35 Section 8, southeast quarter
Bute No. 36 Section 8, southwest quarter
Bute No. 37 Section 17, northeast quarter
Bute No. 38 Section 17, northwest quarter
Bute No. 39 Section 17, southeast quarter
Bute No. 40 Section 17, southwest quarter
Bute No. 41 Section 7, northeast quarter
Bute No. 42 Section 7, northwest quarter
Bute No. 43 Section 7, southeast quarter
Bute No. 44 Section 7, southwest quarter
Bute No. 45 Section 18, northeast quarter
Bute No. 46 Section 18, northwest quarter
Bute No. 47 Section 18, southeast quarter
Bute No. 48 Section 18, southwest quarter

2. That the decisions of the Commissioner of the General Land Office in Contest 11759 dated May 4, 1928, and October 8, 1931, and any other decision in that contest, purporting to declare the Atlas Placer Mining Claims Nos. [441] 1-3 inclusive, 7, 9, 10, 12, 17 and 18 null and

void for failure to perform annual assessment work, were and are void, invalid and of no force or effect whatever upon the validity of the aforesaid Atlas Claims or of any interest or interests in said claims or any of them. In the location certificates the aforesaid Atlas Claims are described as comprising the following portions of Township 4 South, Range 95 West of the Sixth Principal Meridian, Rio Blanco County, Colorado:

Atlas No. 1 Section 12, southwest quarter
Atlas No. 2 Section 13, northwest quarter
Atlas No. 3 Section 13, southwest quarter
Atlas No. 7 Section 14, northeast quarter
Atlas No. 9 Section 14, southeast quarter
Atlas No. 10 Section 14, southwest quarter
Atlas No. 12 Section 10, northwest quarter
Atlas No. 17 Section 15, southeast quarter
Atlas No. 18 Section 15, southwest quarter

3. That the decisions of the Commissioner of the General Land Office in Contest 11761 dated May 4, 1928 and October 20, 1931, and any other decision in that contest, purporting to declare the Camp Bird Placer Mining Claims Nos. 1-20 inclusive null and void for failure to perform annual assessment work, were and are void, invalid and of no force or effect whatever upon the validity of the aforesaid Camp Bird Claims or of any interest or interests in said claims or any of them. In the location certificates the aforesaid Camp Bird Claims are described as comprising the following portions of Township 4 South, Range 95 West of the Sixth Principal Meridian, in Rio Blanco County, Colorado:

Camp Bird No. 1 Section 2, northwest quarter
Camp Bird No. 2 Section 2, southeast quarter
Camp Bird No. 3 Section 2, southwest quarter
Camp Bird No. 4 Section 3, northeast quarter

[442]

Camp Bird No. 5 Section 3, northwest quarter
Camp Bird No. 6 Section 3, southeast quarter
Camp Bird No. 7 Section 3, southwest quarter
Camp Bird No. 8 Section 4, northeast quarter
Camp Bird No. 9 Section 4, northwest quarter
Camp Bird No. 10 Section 4, southeast quarter
Camp Bird No. 11 Section 4, southwest quarter

Camp Bird No. 12 Section 9, northeast quarter
Camp Bird No. 13 Section 9, northwest quarter
Camp Bird No. 14 Section 9, southeast quarter
Camp Bird No. 15 Section 9, southwest quarter
Camp Bird No. 16 Section 16, northeast quarter
Camp Bird No. 17 Section 16, northwest quarter
Camp Bird No. 18 Section 16, southeast quarter
Camp Bird No. 19 Section 16, southwest quarter
Camp Bird No. 20 Section 17, southeast quarter

4. That the defendant, his successors and his or their agents and employees are forever enjoined and restrained from asserting against the plaintiffs and their successors in interest the validity of the decisions above referred to.

Dated at Denver, Colorado, this 1st day of March, 1967.

William E. Doyle
United States District Judge

The foregoing judgment is approved as to form.

Maxwell Aley
Attorney for Plaintiffs

_____
Attorney for Defendant

Filed March 1, 1967

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[443] NOTICE OF APPEAL

Notice is hereby given that the above-named defendant by its attorneys, Lawrence M. Henry, United States Attorney for the District of Colorado, and Richard T. Spriggs, Assistant United States Attorney for the District of Colorado, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final

judgment entered herein by the United States District Court for the District of Colorado on the 1st day of March, 1967.

Dated April 26, 1967.

Lawrence M. Henry
United States Attorney for
the District of Colorado

By Richard T. Spriggs
Assistant United States Attorney
for the District of Colorado
Denver, Colorado

Filed April 26, 1967

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* * * *

[773] REPORTER'S TRANSCRIPT

[774] Be it remembered that the above entitled matters came on for trial to the Court before the Honorable William E. Doyle, Judge, presiding, at the hour of 9:30 o'clock, a.m., on Monday, July 18, 1966.

Appearances:

Fowler Hamilton, Esq., Attorney at Law, of Cleary, Gottlieb, Steen & Hamilton, New York City, New York; and,

Donald L: Morgan, Esq., Attorney at Law, of Cleary, Gottlieb, Steen & Hamilton, Washington, D. C.; and,

Richard W: Hulbert, Esq., Attorney at Law, of Cleary, Gottlieb, Steen & Hamilton, New York City, New York; and,

John B: Tweedy, Esq., Attorney at Law, of Tweedy, Mosley, Aley & Young, Denver, Colorado; and,

Maxwell Aley, Esq., Attorney at Law, of Tweedy, Mosley, Aley & Young, Denver, Colorado, appearing on be-

half of the plaintiff, Oil Shale Corporation, Case No. 8680, and Brown, et al., Case No. 9202.

Fred M. Winner, Esq., Attorney at Law, Denver, Colorado, appearing on behalf of the Plaintiff, Joseph B. Umpleby, Et Al, Case No. 8685.

Richard L: Eason, Esq., Attorney at Law, of Schmidt, Van Cise, Freeman & Tooley, Denver, Colorado, appearing on behalf of the plaintiff Barnette T. Napier, Et Al., Case No. 8691.

Thomas L. McKevitt, Esq., Attorney at Law, United States Attorney, Washington, D. C.; and,

David I. Shedroff, Esq., Attorney at Law, Assistant U. S. Attorney, Denver, Colorado; and,

[775] Robert Mesch, Esq., Attorney at Law, Regional Solicitor's Office, Denver, Colorado; and,

Lowell Madsen, Esq., Attorney at Law, Regional Solicitor's Office, Denver, Colorado, appearing on behalf of the Defendant in Cases Nos. 8680, 8685, 8691 and 9202.

W-h-e-r-e-u-p-o-n, the following proceedings were had, to-wit:

* * * *

[833] MR. McKEVITT:

* * * *

Now with that coming along, we again had a revival of a number of people coming in and applying for patents, and between 1948 and 1955, there were a lot of patents [834] out of the Department of Interior in oil shale lands, many of which did cover lands that had been declared null and void in these earlier contests.

Now the evidence—we will go into that somewhat—we will show how many lands were actually patented during that period. There was somewhat of an issue as to whether Interior knew in every instance that the claims had been declared null and void for failure to do assessment work. Certainly the evidence will know she knew in certain some—toward the latter ones—but we contend the great bulk of them because of the various ways proceedings came along and lack of statements, they had been declared null and void, and it wasn't done.

Now we might mention just briefly here that in 1953 and 1954, this matter of having a lot of old nontermin-

able mining patents out on the public domain became a problem. Well, I would say to a great extent to the mineral interest, people were interested in oil and gas who might want to get an oil and gas permit on the public domain, and they would say, "You go out here and try to get an oil and gas lease. You don't know whether there was a mining claim out there or not. All the land looks alike. Nothing on the land to show it is there. We can go down and look at the records at the County Courthouse and even there we will [835] have an awful time trying to find out because of the survey problems."

* * * *

[876] MR. HAMILTON: Your Honor, there is one question that arises and that has to do with this: In view of the fact that Mr. McKevitt is going to made addition objection, the question arises in connection with title and standing to sue.

Maybe I should make it clear by saying this: That is there is no question about the record title, then at this point we are prepared to rest as far as our prima facie case is concerned. In other words, if I may state just a moment about the title point.

We have furnished counsel for the Government with an abstract of title. There is one supplemental part of it that we will have later in the day that will bring it up to the appropriate date. We have it now, as a matter of fact.

Now, if subject to his objection on relevancy, counsel for the defendant is prepared to say that that abstract is a proper abstract, prima facie, gives us title, why, then, we are prepared as far as our prima facie case is concerned, if I make myself clear?

MR. McKEVITT: What case are you talking about?

MR. HAMILTON: Toscoe and Brown; both of them.

MR. McKEVITT: Toscoe and Brown, as far as offering the abstracts?

[877] MR. HAMILTON: Yes, as far as the two cases.

THE COURT: Well, I don't think the Government has ever contended that there are any other claimants worthy of attention. In other words, it is only the Gov-

ernment's objection or theories that are in the way of the title; isn't that right?

MR. McKEVITT: We want the abstract of title in, though, your Honor. We want to be able to refer to some of the title history of how these older claims came down—

THE COURT: Have you tendered those?

MR. HAMILTON: Yes, sir, we have.

THE COURT: Those are a part of 308 or 9 exhibits; right?

MR. HAMILTON: Yes.

MR. McKEVITT: What do you want to know, specifically?

MR. HAMILTON: I want to know whether it is your position now before I say I close, as far as the prima facie case is concerned—the things I want to find out is whether or not they contend that we have failed to make a prima facie case or showing of legal title or whether it will be necessary for me to put title counsel on the stand and go through the abstract shows that it shows?

MR. McKEVITT: No, that won't be necessary.

MR. HAMILTON: That won't be necessary?

MR. McKEVITT: I am sure if you put Mr. Tweedy on, [878] and we will leave it with the abstract, and that's plenty. There will be no need to put a technical witness on the stand.

THE COURT: In other words, you are willing to stipulate that if he called Mr. Tweedy, he would testify that title—

MR. HAMILTON: Is in the plaintiff's.

THE COURT: Is in the plaintiff's; right.

MR. McKEVITT: Right. So we are offering the abstract as such will go into evidence.

THE COURT: All right.

MR. HAMILTON: If Your Honor, please, I am informed by my colleagues there are six patent files that are in front of Mr. Shedroff that have beeen designated—Mr. Shedroff corrects me and says there are seven.

THE COURT: Very well.

MR. HAMILTON: We have just learned those are available today. We indicated to the Clerk that we would

like to offer them, and they have been numbered, but not marked. We would like to have them marked as a part of our case.

THE COURT: These files? These are Department files?

MR. HAMILTON: Yes.

THE COURT: Pertaining to these patents.

[879] MR. HAMILTON: To these patents.

MR. McKEVITT: Are you talking about the contents files?

MR. HAMILTON: I am talking about these files here. They relate not to claims involved in this case, but to the claims we argue are analagous to those.

THE COURT: Oh. One of them is the LaPauz claim, which was the first patented claim, and the other was the Sheridan claim, the two being contiguous to the Oyler claims involved in the Brown case. Do you object?

MR. McKEVITT: We do object. I see no relevancy between these files on some other claims and the issue before this Court.

THE COURT: Why do we need to clutter our records with all of that material? Aren't there facts in the record now? I note that you have commented on these cases in your brief. Why do you have to have this basic raw material? What do they add? Can't you take note of the fact of their having those cases without having the details of them in the record here?

MR. HAMILTON: The problem of proof, maybe we are over scrupulous, Your Honor. The problem of proof is La Pauz and the Sheridan and the Oyler claims, we will argue were exactly the same posture as regards the various points of the type that has been made upon the patents were issued, [880] we would argue in the La Pauz and Sheridan and case. We would try to offer or show. In other words, it is difficult to show without the records that there wasn't some difference. We have the files in there for the Oylers

* * * *

[978] MR. HAMILTON: No use belaboring this to Your Honor. Your Honor has been diligent enough to read through the documents. We will set it out in our

documents a little more, but we will as we sum it up. We have the point on jurisdiction.

We have a point on the rule which we urge should not be changed retroactively. We have our construction of the Oil Shale Company decision that it canceled and phrase overall as construed by the papers in the trial brief and in the record showing that they were canceled, set aside patents were granted.

We have our fourth point even if the decisions were not void, they were erroneous and under the circumstances as we urge in Tosco, we are now entitled to an appeal.

[979] Then I will touch briefly, if I may in Tosco, Your Honor, upon points that are important but subordinate, but I believe we would all agree to the main thrust of the case and those are three in number.

(1) Coming to the relef that we seek in Brown. The Brown cases, Your Honor will recall, is one that was one of the early claims that was located in the Naval Reserve. The Navy was naturally and properly interested in in to see if there were any ways to clear these claims out. There was an investigation in 1918 of the Brown Oyler claims and of the two contiguous, the LaPauz and Sheridan.

The Sheridan and the LaPauz and Oyler were held to be valid claims at that time. LaPauz and Sheridan proceeded to patent.

Another investigation was held to these claims in 1927, 1928. It was there held that their claims were valid. They had not been abandoned. They were properly located and that there was a proper discovery, but the assessment point was raised.

The decision adverse to the claim on the assessment point was entered subsequently after Krushnic and subsequently to Virginia-Colorado cases the record whows was ignored.

Then in 1957 and 1958 after the patent application had been filed in 1955, there was another [980] investigation.

As the documents show, the mineral report was that here is a valid claim. It is good. There was no ques-

tion of abandonment raised. There was no question of improper location raised. And it was recommended that patent issue.

The recommendation was approved by the superior of the mineral examiner. The patent claim was clear listed for patent. A certification note was made that the patent should issue. And it was caught up in this proceeding.

Now, if Your Honor please, under those circumstances, we feel a respectable argument could be made that there should be ordered an issuance of a patent and that we do not ask for.

We realize this is a difficult question. We think a very powerful argument could be made on the basis of the National Labor Relations Board against Atkins and other cases, that the matter should be remanded to the Interior with instructions to decide the case upou the basis of the record as it existed in 1962, which was the record before the Secretary which went up before the lower official on appeal, and then to the Secretary on the basis of which this claim was declared invalid in the Union case for failure to do assessment work, and our argument would be there, that [981] they have exhausted their administrative jurisdiction in argument that they turn around the other way, of course, on us. But we are not asking for that.

Although, we think a very powerful argument could be made that if an administrative agency looks into everything, raises every issue, and then denies the citizen right on one ground that that should be enough; but we don't ask that.

THE COURT: If on a remand if you just tell the agency to proceed in accordance with the views expressed, which is an interpretation of the law, isn't that as much as you can do? You can't design a procedure for them?

MR. HAMILTON: I think that's right, Your Honor, but we would suggest that there is one thing further that would be appropriate for you to do—

THE COURT: In other words, you would interpret laws as presented to you, and then if it calls for a re-

mand, then they are to view the law as you find it, I suppose?

MR. HAMILTON: Would not a decree in that case leave one question open, and that would be this:

Maybe Your Honor already has this in mind, but would a decree of that kind envisage, for example, because when they went back, say, they could raise abandonment which they have looked at three times and found it doesns't exist, and then if the claim were declared invalid [982] for that, and we came up and got that set aside, then we would be thrown back into the years and have to have a look at the question of location, and then if we lose on that, come back and assume we prevailed on judicial review, and then could we—we would be thrown back on discovery.

THE COURT: Do you have law that says that they are precluded from proceeding or taking up any other ground now? Do they have to limit themselves?

MR. HAMILTON: To assessment work. Do you mean in this case?

THE COURT: Yes.

MR. HAMILTON: Well, we hadn't asked. We were not going that far. What we were going to ask Your Honor to do was to tell or direct the Secretary to decide or—either to have the record before him, or have another hearing to come in with everything which he wanted, which seems to me not unreasonable, but in other words, let him have a look at everything, but not keep shooting away at us to state it. Anyway, we will submit it on authorities. We think that would be reasonable. We also think it would be reasonable for us to request, and to hope Your Honor would think it, to grasp the kind of retention of jurisdiction under the circumstances to see that the decree has been carried out which has been done in some of the Labor Board decisions, which we will present to you.

[983] THE COURT: Anyhow, the Brown case which it involves as a patent, it calls for a different kind of relief than in the Oil Shale Corporation; isn't that correct?

MR. HAMILTON: Of course, that then leaves me only—

THE COURT: What kind of relief are you requesting in that?

MR. HAMILTON: In the Tosco case?

THE COURT: Yes.

MR. HAMILTON: There we are requesting that we have a declaration from Your Honor that the old 1920—I think it was decision 129, 130 and 131, be rescinded, expunged, so they can no longer be used as a bases for contention by the Department that the claims are invalid, because of those developments, a declaratory judgment proceeeding, and that's all. That's the bit of relief we seek there.

THE COURT: And then you would have to go into the Department and apply for patent?

MR. HAMILTON: That's correct, sir, and they could raise every possible objection. We are not asking for any other further relief there. We don't think we are entitled to it, but we do think we are entitled to that on the record.

Now, if Your Honor, please, I turn to the two remaining points; one having to do with personal jurisdiction. As your Honor will recall—

THE COURT: This applies to a limited—

[984] MR. HAMILTON: This applies only to the Tosco case.

* * * *

[1020] MR. McKEVITT: True, they would have to go to the Secretary and then after they went to the Secretary there still existed this right to go to a court and this is the matter that gets very interesting. This is what Krushnic did. He went all the way through it. That is what the Ickes vs. Colorado people did. Here was the remedy. Every single one of these other people before Krushnic who had wanted to come in and take that remedy could have done it. Now, for one thing most of the cases went off on failure to appear. There was so little interest by a lot of these people in all these claims out here where they were brought that many were so-called default decisions, so I suppose they weren't even inter-

ested enough to come in and appear but they were more interested to go on to appeal. So, that's the factual situation with thousands of these old claims which we are concerned with in this particular res judicata situation. These people could have come in. They could have gone up to the Secretary and then they could have gone to the court.

Now, I don't know of any other—we have talked about this before; to me they would have to go to the courts at a reasonable time, but I don't know of any statute of limitations of going to a court.

There was the remedy for every one of these people. Failing to do it, it was perfectly appropriate to apply these principles of res judicata which, Your Honor, may lead us to [1021] the second point and this is the thing which Mr. Hamilton began with. He said, "Well, I want jurisdiction—." He said my second line, he says, after the decision came down in Ickes vs. Virginia-Colorado,—I say that is a matter of fact you actually vacated every one of these earlier decisions. Now he talks about the one little subsequent decision of the Secretary in 1935 and he is talking about hundreds of thousands—well, I hate to get into that—let's say fifty, sixty or seventy thousand of these things which had been declared null and void before, which there had been no appeal. They were setting there. They were final. He says now, "Oh, but you in fact are the man back in 1935 which would be under Secretary Ickes—that he did in fact reverse all of these. And we say he didn't and that is one of the things here.

* * * *

[1511] PLAINTIFF'S EXHIBIT

(Stamp) Dept of the Interior Secy's Off. Mails & Files Received Apr 20 1920 (word illegible)

(words illegible) Washington April 20, 1920. 2-39 Mineral Lds.

Memorandum for the Secretary of the Interior.

We now have before us for consideration the first application for patent for oil shale claims, the same being Glenwood Springs 013847 by Verner Z. Reed and James Doyle for fourteen placer claims covering 2240 acres situated in the Naval Oil Shale Reserve No. 1 created by Executive Order of December 6, 1916.

On Departmental sanction, we have written many letters to inquirers stating that, thus far, neither the Department nor any court, so far as we know, has ever held that oil shale lands and deposits are subject to the placer mining laws. It is understood that a very large portion of the oil shale lands in Colorado and Utah are covered by placer claims; some in good faith, probably more otherwise. In fact, we know of one large operation that seems to be entirely fraudulent, and we have heard of many others. Complaint even has been made that the stockmen are taking up these claims to hold the lands for grazing purposes.

The new leasing Act of February 25, 1920, provides for the leasing of oil shale deposits, and provides further (Sec. 21) "that any person having a valid claim to such minerals under [1512] existing laws on January 1, 1919" may transmute same into leases. Sec. 37 of the Act provides for the patenting of valid claims under preexisting laws.

Discovery is easy as to those claims that are located along the outcrops. There are doubtless many other claims back from the outcrops on which no discovery will appear. If we patent any oil shale placer claims, the leasing act will be a (word illegible) letter as to oil shale for some time. Note the language of Sec. 7 of the oil shale regulations under the leasing act, which were designed not to admit the existence of such a thing as a valid claim under the placer laws.

The matter is deemed of sufficient importance to ask for instructions. Submitted herewith is the report of a Special Agent and Mineral Examiner of this office on these locations, together with the record of the applications.

May 10, 1920 Answered Tallman

[1513] PLAINTIFF'S EXHIBIT 2

Report of the Secretary of the Interior
F.Y. 1927 29

* * * *

Oil Shale

One of the important subjects before the department during the year was that of oil shale, immense areas of which exist in Colorado, Utah, and Wyoming. Prior to February 25, 1920, these deposits were held to be subject to location and entry under the placer mining laws. On that date Congress passed the general leasing act, which repealed the placer mining laws as applicable to such deposits, and provided that thereafter they would be subject to disposition only through lease. One of the concluding sections of the act, however, provided "that valid claims existent at date of passage of this act, and thereafter maintained in compliance with the laws under which initiated" might be perfected under the prior existing laws. Those prior laws required the claims to be located, a valuable deposit of mineral discovered, that not less than $100 worth of labor or improvements be placed upon the claims each year, and that as a prerequisite to patent not less than $500 should have been expended upon or for the development of each location.

Immediately prior to the enactment of the leasing act, numerous locations were made upon the shale areas under the placer mining laws, and many of these locations have been followed by applications for patent. It became the duty of the department to consider these claims and to

determine whether the locators had complied with the requirements of the general mining laws. A public hearing, attended by many people interested, was held in the department on December 1, 1926, and the subject was thoroughly discussed. Following this hearing, after extended consideration by the department, decision was rendered in the case of Freeman et al. v. Summers, involving, primarily, the question of what constitutes sufficiency of discovery upon certain shale placer mining claims. The department applied [1514] the long-established rule that when the locator had discovered mineral within the limits of his claim in a situation and formation that the vein or deposit could be followed to depth, with reasonable assurance that paying minerals will be found, such discovery may form the basis of a patent, where compliance with the law has been had in other respects.

Field investigation is being made of all shale claims, to the end that valid rights may be protected and permitted to be perfected, but that invalid claims, where compliance with the laws has not been had, may be eliminated and canceled. Many difficult questions of law and of fact necessarily arise in these cases, and while general rules of law may be applied, the facts of each case, as disclosed by investigation and evidence, must govern the department in the disposition of the cases.

* * * *

[1515] PLAINTIFF'S EXHIBIT 3

Department of the Interior General Land Office Washington

In reply please refered to "A"CAO

Mar 7 1927 File as May 31, 1927-

Dep't of the Interior Received Mar 8 - 1927 To Solicitor Bedy's Off-Appts., Mails & Files (Stamp)

Proceedings in oil shale locations.

The Secretary of the Interior Sir:

* * * *

[1516] The question of the advisability of examining all oil shale locations in the field where no application for patent has been made nor any complaint filed against the same or where no application for lease or otherwise for the land has been filed has arisen. If such claims are to be examined at the present time the matter of procedure against the same requires consideration. It is thought possibly that by proceeding now against such locations evidence may be gathered which might not be available in the future should applications for patent be filed.

* * * *

[1519] The situation is called to your attention with the request that instructions be given by you as to the examination of the claims mentioned and as to the procedure that may be properly followed to declare the claims invalid if the evidence so warrants.

Very respectfully,

William Spry
Commissioner.

4-mc
4-7 mdo

May 31 1927 Answered

[1520] PLAINTIFF'S EXHIBIT 4

Department of the Interior Office of the Secretary Washington M-21882 May 31, 1927.
The Commissioner of the General Land Office.

Dear Mr. Commissioner: I have your request for instructions in the matter of oil shale claims (March 7, 1927, A. - C.A.O.)

After careful consideration, it is the judgment of the Department that all oil shale locations of record should be examined and reported upon by inspectors of this Department. The Navy has requested that this be done

with respect to all locations within the exterior limits of the naval oil shale reserves.

On the unreserved public domain it seems advisable that this course be pursued for numerous reasons. The Department believes that bona fide claims, regularly located and maintained in accordance with law, should be protected and be allowed to proceed pursuant to the provisions of the law under which initiated, and section 37 of the leasing act. Paper locations and locations not maintained as required by law constitute a cloud upon the public lands and interfere with their proper use and disposition. Moreover, as time goes on, it may be more and more difficult to ascertain and establish the facts surrounding locations and the work performed by the lomators and their successors in interest, or failure to perform work as required by law.

[1521] It seems important, therefore, that the examination be made as soon as practicable and the facts ascertained be made of record and available to the Department through the inspectors' reports.

It is therefore directed that the division inspector be instructed to proceed to examine and submit reports upon all claims of record within the area described. Where the reports are adverse and proceedings against the locations are contemplated, the propriety of proceeding immediatley, or waiting until an application for patent has been filed, or the protest submitted, may then be considered and further instructions asked for and received from the Department.

In order to expedite this work, both in the interest of bona fide claims, and in the interest of the Government as to claims not valid, an effort will be made to give the division inspector additional assistance for field work in the near future.

Very truly yours,

(Signed) E. C. Finney.
First Assistant Secretary.

[1522] PLAINTIFF'S EXHIBIT 5

Address only the Commissioner of the General Land Office
United States Department of the Interior General Land Office Washington

Reply please refer to ..... May 7, 1930. 2-139
Oil shale. Memorandum for the Secretary.

* * * *

After the leasing law was enacted, the matter of disposing of the oil shale deposits and the lands containing the same, presented a situation that required close study. It was decided that the claims should be investigated in the field for the purpose of determining whether or not they were bona fide claims existing at the date of the act, and also whether they had been maintained in accordance with the mining laws. These investigations have since been carried on and charges preferred against such locations as were reported to be invalid for any cause, such as, lack of discovery, dummy locators and failure to perform annual assessment work, [1523] and where applications have been filed failure to perform the required patent expenditures. Proceedings were instituted against claims reported in default in the performance of annual assessment work on the belief that in order to maintain a claim the locator must perform each year the required annual labor, under section 2324 R.S., which provides that on each claim not less than $100 worth of labor shall be performed or improvements made during each year.

* * * *

[1525] PLAINTIFF'S EXHIBIT 6

The Secretary of the Interior Washington Jun 16, 1939

Hon. Rene L. De Rouen, Chairman, Committee on the Public Lands, House of Representatives.

File copy
Surname:
Friedman
Hudson
Thomas
Speck
illegible
illegible
Terrett
Bradshaw
Altizer
Barash
Willey
Havell
Funck
Johnson
Stabler
Mendenhall
Burlew
Sears

My dear Mr. De Rouen: Further reference is made to your request of June 2 for a report on H. R. 6560 entitled "A Bill relating to placer mining claims for deposits of phosphate, sodium, potassium, oil, oil shale, or gas on the public domain."

* * * *

Since the recording of such mining locations was entrusted to the control of the miners of each mining district in conformity with [1526] local law, and since no complete examination of these records has ever been made, accurate figures as to the number and extent of such claims are not available. However, an examination was made by the General Land Office in the years between 1920 and 1930 to determine the status of the oil shale placer mining claims on and about the Green River shale formation in Colorado, Wyoming, and Utah. That examination disclosed that more than 30,000 such claims, embracing more than 4,000,000 acres of the public domain, were not being maintained by the performance of annual assessment work.

Conceiving that the Mineral Leasing Act conferred such authority upon him, the Secretary of the Interior challenged in departmental proceedings the validity of thousands of these claims. After full hearing the claims were declared void because of default in assessment work. Appeal was taken from these proceedings and in the cases of Wilbur v. Krushnic, 280 U. S. 306 (1930) and Ickes v. Virginia-Colorado Development Corp., 295 U. S. 639 (1935) the Supreme Court held that the proceedings exceeded the authority of the Secretary and were, therefore, without effect, From these decisions it is apparent that, although the performance of annual assessment work is expressly required by law, there is no statutory authority to enforce that requirement.

* * * *

Section 3 would effect the termination of such claims as are not maintained by the making of the assessment expenditures required by section 2324 of the Revised Statutes. The lands thereupon would be [1527] subject to laws and executive Orders governing the administration and disposition of public lands.

* * * *

Sincerely yours,

(Sgd.) Harold L. Ickes
Secretary of the Interior.

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* * * *

Clerk's Note: Plaintiff's Exhibits No. 8—Letter to Register from Wm. Spry 12/10/27; No. 9—Letter to Register from Commissioner 5/4/28; No. 10—Letter to Register from Wm. Spry 12/10/27; No. 11—Letter to Register from Wm. Spry 5/4/28; No. 12—Letter to Register from Wm. Spry 12/10/27; No. 13—Letter to Register from Wm. Spry 5/4/28; No. 14—Letter to Register from C. C. Moore 6/12/29,—appear in separate exhibit book.

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* * * *

[1568] PLAINTIFF'S EXHIBIT 15

14 Report of the Secretary of the Interior, FY 1930
Oil Shale

Oil-shale lands, though having no immediate value for oil, have received vigorous protection. During the past year, commencing last spring, every mining engineer in the General Land Office, save three, was called off other work and under my personal orders assisted in identifying, examining, and physically posting more than 6,400 oil-shale claims with notice of default to the United States for failure of the claimant to perform assessment work. This followed the Supreme Court decision of Wilbur v. Krushnic, which, although it reversed the department and sustained the claimant on the issue of assessment work, and so swept aside the bulk of our defensive procedure, left the possibility (though no certainty) that if the remaining claims were posted before resumption of work on the claim, a different result would follow. This posting work will continue during the current year, and the tremendous task of adjudicating these claims will get under way. A second test case in the courts may be expected. No leases have been issued under this administration. But oil-shale claims valid in 1920 can be taken to patent under the mining law, without any discretionary power in this department to decline to issue the patent. Accordingly about 42,000 acres have been patented.

* * * *

[1569] PLAINTIFF'S EXHIBIT 16

Telegram Official Business—Government Rates

From Interior Department Bureau Land Office Chg. Appropriation (name illegible) Havell Hathaway L P.J.A.

R. S. Kelley, Chief of Field Division, G.L.O., Postoffice Building, Denver, Colorado. Jan 15 1930

Your wire eleventh Krushnic decision you will submit soon as possible reports in all cases where shale locators

defauted annual labor and no evidence of resumption of work Stop You are also directed to as soon as practicable post notices on all such claims against which charges not already issued notices to be addressed to record claimants and to recite failure to perform assessment work and failure to resume and that by reason of such default the United States has taken possession of the land for purpose of holding for lease under leasing act of February twenty fifth nineteen twenty Stop Notice should bear date be over your name and official title and signed by the posting officer and credible witness Stop Preserve copy for files with statement of date and place posting

Approved: Jan 15 1930

Moore

(Sgd.) Edwards
Assistant Secretary

Received Jan 15 1930 G.L.O.

[1570] PLAINTIFF'S EXHIBIT 17

United States Department of the Interior General Land Office Washington

In Reply Please Refer to 1366293 "N" UEG, March 26, 1930 Instructions,

Mr. R. S. Kelley, Chief of Field Division, G.L.O. Denver, Colorado, Sir:

* * * *

[1571] Relative to posting notices on oil shale locations, that the United States challenges the claimant's right to the possession of the lands within the claims, because of a default in the performance of assessment work, such posting should be made, to be followed by the direction of adverse proceedings by this office, in the usual way, when it is more expeditious to do so, to head off resumption of work, than to wait until adverse proceedings are directed by this office, and in those instances where the addresses of all or some of the claimants are unknown,

so that notice of the default cannot be served on all or some of the claimant by registered mail.

* * * *

[1572] As to the second objection, the fact that an oil shale claimant failed to perform sufficient or no assessment work for the year ending July 1, 1929, and prior years, is of no consequence, if he resumes work before notice is [1573] served on him by the Government and completes such resumed work to the value of $100, with reasonable diligence, as he has then maintained his claim by the resumption of work before challenged by the Government. In order to constitute a good charge the Government must allege a default in the work, and also a failure to resume work, and must assume the burden of proving both allegations.

Very respectfully,

Sgd. C. C. Moore
Commissioner.

Approved: March 26, 1930

(Sgd.) Ray Lyman Wilbur
Secretary.

3-17-FJ

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* * * *

[1578] PLAINTIFF'S EXHIBIT 18

In Reply Please Refer To ..... (names illegible)
Department of the Interior General Land Office
Washington Apr 19 1930 1364176 "L" PJA
Address only the Commissioner of the General Land Office

Posting on oil shale claims. 2-139 oil shale

Mr. R. S. Kelley, Chief of Field Division, G.L.O., Denver, Colorado:

Sir: Referring to the proceedings against oil shale claims since the Krushnic decision, you have been directed

in a number of cases to post notices on the claims where the report submitted by you did not furnish the post office addresses of all the claimants. You were also given further general instructions in this respect by letter of March 26, 1930 (1366293).

The direction given in the specific cases was done as a precaution to post the claims after you had notice that charges had been issued, if posting had not already been done under the telegram of January 15, 1930. The telegram directed that, as soon as practicable, you would post notices on all claims against which charges had not already been issued which are in default of annual assessment work and no evidence of the resumption of work

Copy For Secretary's Office To Be always left on top. (Signed copy only rec'd in M. & F.) To Secretary 4/15/30 U.E.G.N. For signature (words illegible)

[1579] found. This of course included all claims not yet reported on, and all claims reported in default where charges had not been issued. Nothing in the letter of March 26, 1930, is to be construed to change or modify the telegraphic instructions, but it is desired that the posting be proceeded with as rapidly as possible so as to interpose the Government challenge against the resumption of work.

While you are doubtless taking all necessary steps to get notices to the claimants by posting and by furnishing correct post office addresses, it has been thought advisable to give you these further directions in order that you may understand that the purpose is to give prompt notice by appropriate charges and by posting in every proper case.

You are advised, further, that by Executive order of April 15, 1930, the President withdrew all deposits of oil shale, and lands containing such deposits, owned by the United States, and reserved the same for the purpose of investigation, examination and classification. You will therefore, modify the wording of the notices to be posted on claims in default of annual labor, referred to in said telegraphic instructions of January 15, 1930, so as to omit

(handwritten notation) 2-153 General Oil Shale with (word illegible)

[1580] after the statement that "the United States has taken possession of the lands", the declaration of the purpose of holding the same for lease under the leasing act of February 25, 1920. In lieu thereof, you will state that by reason of such default, "the United States has taken possession of the lands for its own uses and purposes".

Very respectfully,

C C Moore
Commissioner.

Approved: Apr 19 1930

(Sgd) Ray Lyman Wilbur
Secretary.

[1581] PLAINTIFF'S EXHIBIT 19

Department of the Interior Memorandum for the Press Immediate Release September 29, 1930.

* * * *

It was stated at the department that no leases for oil shale have been issued under this administration. The President's oil conservation policy was carried into effect by order of the department on March 13, 1929, as to both oil and oil shale, although oil shale has only a potential value until some economical process for extracting the oil is discovered.

However, the Secretary's discretion to refuse to issue leases does not, under the law, extend to claims located under the old mining laws before the mineral leasing act came into effect, in 1920. The mineral leasing act left intact such claims so long as they were maintained in accordance with the former law.

* * * *

[1582] However, because the adverse Krushnic decision left open the question of whether the Department had the right to declare these claims forfeited if such forfeiture was demanded before the locator had resumed his assess-

ment work, Secretary Wilbur, immediately after the Supreme Court decision came down, directed that action be taken against all claims then in default upon which work had not yet been resumed. Accordingly, practically every available man in the General Land Office field force was assigned to the duty of posting notices on oil shale claims that the Government claimed the land for default. Approximately, 5,700 notices were posted during the current season and these claims now await adjudication. In addition, adverse proceedings were directed against 3,081 other oil shale placer locations. Of this number 2,078 have been adjudicated as null and void by the Department after notices were served on the claimants of default in [1583] assessment and failure to resume work. Of the 5,700 oil shale claims that have been posted there are included about 912,000 acres, and in the 3,081 additional claims against which proceedings have been instituted, approximately 492,960 acres, making a total of 1,404,960 acres involved in such claims against which challenge has issued on the orders of Secretary Wilbur.

* * * *

The right of the department to challenge locations, as well as patent applications, for failure to do assessment work has been vigorously denied by oil shale claimants. Secretary Wilbur, however, has declined to recede from the requirement that such work be done and there are now pending in the department test cases which the locators asserted they plan to take into court.

* * * *

[1584] PLAINTIFF'S EXHIBIT 20

"A" CAO The Secretary of the Interior Washington 139 Obenchain Havell Jun 7 - 1930 2-139 Oil Shale Part 3

The Honorable The Secretary of Agriculture.

My dear Mr. Secretary: Since the decision of the U. S. Supreme Court was rendered on January 6, 1930, in the case of Ray Lyman Wilbur, as Secretary of the Interior, petitioner, vs. United States on Relation of Emil L.

Krushnic, involving oil shale claims, efforts have been made to give notice to the locators or their transferees that the United States has taken possession of the land for its own uses and purposes because of failure to perform annual assessment work and where such work had not been resumed prior to the giving of such notices.

The field force of the General Land Office in Colorado, Wyoming and Utah were,on January 15, 1930, directed to submit, as soon as possible, reports in all cases where shale locators defaulted in their annual labor and there was no evidence of resumption of work, and also to post notices on all such claims against which charges had not already been issued.

It has been found that it is impossible, without long delay, to obtain service in these cases of the charges made and, therefore, the posting of the claims on the land has been resorted to. This posting is being carried on rapidly so far as the claims on the public lands are concerned.

* * * *

[1585] Very Truly yours,

(Sgd.) Ray Lyman Wilbur

[1586] PLAINTIFF'S EXHIBIT 21

Report of the Secretary of the Interior F.Y. 1931 29

* * * *

Oil Shale

* * * *

[1589]

32 Report of the Secretary of the Interior

* * * *

The oil-shale problem arises from the provision of section 37 of the mineral leasing act which permits claims located prior to the date of the act (February 25, 1920) to proceed to patent in compliance with the mining laws as they existed on that date. The principal requirements

are good faith of the locator, performance of assessment work, and discovery.

Some months prior to Kelley's resignation a Supreme Court decision in the case of Wilbur v. Krushnic had held that a locator in default in assessment work could resume work at any time in the absence of a challenge by the United States. Thereafter, convinced that many claims were being held without compliance with the law's requirement of assessment work, the department in January, 1930, had undertaken the task of physically posting notices of forfeiture on each claim as a preliminary step to adjudication. This work had been under way many months to the time of the Kelley matter. To date about 7,500 such claims have been posted; about 5,500 remain. Where the law as to discovery, assessment work, and good faith of locators has been complied with, patents issue on completion of $500 of development work and application for patent. About 195,000 acres have been patented in all. The estimated oil-shale area in Colorado is about 1,496,027 acres, in Utah, 2,754,959, and in Wyoming, 4,006,805; 156,024 acres are included in two naval reserves.

* * * *

[1590] PLAINTIFF'S EXHIBIT 22

18 Report of the Secretary of the Interior, 1932

* * * *

Oil Shale

* * * *

It was a tremendous task involving the filing of charges and the preparation for trial of cases against about 22,000 claims, covering about 2,600,000 acres. When the work was well under way, it may be recalled that one of our employees at Denver, a man named Ralph S. Kelley, who apparently had been harboring a fixed idea that the United States was being defrauded of these lands in some way, sold to the now defunct New York World some dis-

tortions of [1591] information he had abstracted from Government files in return for $12,000. The World's series of 'revelations' proved a fiasco, but the resulting work, involving an investigation by the Senate Public Lands Committee, necessarily delayed us. Now, however, the proceedings against these claims have been largely completed. Twelve thousand ninety-nine claims have been adjudged null and void and the area remaining subject to adjudication has been reduced to 1,165,000 acres. Those claims which have been legitimately maintained are, of course, being permitted to proceed to patent, and efforts are made to protect all equities.

* * * *

[1592] PLAINTIFF'S EXHIBIT 23

60 Report of the Secretary of the Interior, 1933

* * * *

Oil-shale contests.—There were 120 contests against oil-shale locations pending at the beginning of the year, including locations under patent proceedings; 1,655 new cases were added and 1,615 were disposed of, leaving 160 pending. Locations to the number of 11,146 for 1,448,980 acres were declared null and void.

* * * *

[1593] PLAINTIFF'S EXHIBIT 24

July 8, 1930 1349718 "N" UEC Adverse proceedings directed.

Register, Denver, Colorado.

Sir:

* * * *

Inasmuch as the charge as made, does not contain sufficient allegations as a basis for protest or contest, so that

the action taken declaring the locations null and [1595] void was not warranted, and as a supplemental report by the Chief of Field Division has been received, you will proceed in accordance with circular of February 26, 1916, and in the notice provided for in paragraphs 3, 4 and 5 thereof, you will state that the following charge has been filed by a representative of this office:

"That annual assessment work to the value of $100 was not performed upon each or any one of the Four A Nos. 1 to 4 inclusive, oil shale placers, for the year ending July 1, 1929, and that work has not been since resumed."

* * * *

Very respectfully,

C C Moore
Commissioner.

Approved: Jul -8 1930

(Sgd.) Ray Lyman Wilbur
Secretary.

6-28-ML

[1596] PLAINTIFF'S EXHIBIT 25

Address only the Commissioner of the General Land Office 278
United States Department of the Interior General Land Office Washington
Towner Goerner (names illegible) Edwards (name illegible)
Reply please refer to 1273037 "N" WST Jun 7 - 1930
[Stamp] Dep't of the Interior Received Jun 11 1930 Secy's Office Aps. Mails & Files Oil shale placers.
Instructions requested. 2-139 Oil Shale
The Secretary of the Interior.

Sir: December 10, 1927, adverse proceedings were directed by this office against approximately 16 groups of oil shale placers embracing various lands in Ts. 2 and 4

S., Rs. 95, 96, 98, 99 and 100 W., 6thP.M., Colorado, upon the charge:

That the required assessment work for the years ending July 1, 1921, to 1927, inclusive, was not performed upon or for the benefit of the claims.

There was no charge made that the work had not been resumed.

Upon reports received from the Register of the Denver land office, before the reversal by the Court of Appeals of the District of Columbia, of the action of the Supreme Court of the District of Columbia in the Krushnic case, some of the claims were declared by this office to be null and void on that charge. No action has been taken in the matter of reports received since then, as to the remainder of the claims in these groups, upon the charge.

[1597] In my opinion, the action declaring some of the claims null and void on the charge as made, is not tenable and the balance of the claims cannot now be declared null and void on such charge.

It will, therefore, be necessary not only to post the claims that are still undisposed of, but also those which have been heretofore declared null and void, or to file amended charges against all such claims if the facts now warrant.

If you agree with this view, and approve this letter, instructions will be given to treat these locations, and others in like condition, the same as other locations which are now being handled by our field force.

Very respectfully,

C C Moore
Commissioner.

Approved: Jun 13 1930

(Sgd.) Ray Lyman Wilbur
Secretary.

6-6 las

[1598] PLAINTIFF'S EXHIBIT 26

Inc. United States Department of the Interior General Land Office Washington
1273037 "N" UEG Jun 19 1930 Instructions.
Mr. R. S. Kelley, Chief of Field Division, G. L. O., Denver, Colorado.

Sir: Prior to the reversal by the Court of Appeals of the District of Columbia of the decision of the Supreme Court of the District of Columbia in the Krushnic case, a number of oil shale placer claims, for which patent proceedings had not been instituted, were proceeded against on charges of failure to do assessment work, which charges as made were of no effect, in view of the decision of the Supreme Court of the United States in said Krushnic case, and all oil shale claims, which were proceeded against and declared null and void on that charge alone and those claims which were reported on relative to such defective charge and which have not finally been acted upon, will have to be proceeded against anew.

[1599] This is in accordance with the suggestions made and instructions requested by this office of the Secretary of the Interior on June 7, 1930, approved by the Secretary of the Interior June 13, 1930, copy inclosed.

The case referred to in said letter involves the War Eagle Nos. 1 to 19 inclusive, etc., oil shale placers, reported on by Mining Engineer Oral J. Berry on July 16, 1927.

You are instructed to treat all claims of this status the same as others claims which are now being posted, and furnish this office with a list of the cases which will be affected by such action.

Very respectfully,

Commissioner.

Clerk's Note: Plaintiff's Exhibits No. 27—Telegram to Commissioner from Kelley 6/23/30; No. 28—Letter to

Kelley from Moore 6/30/30; No. 29—Letter to Register from Moore 6/30/30; No. 30—Letter to Register from Moore 7/22/30—appear in separate exhibit book.

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* * * *

[1606]

PLAINTIFF'S EXHIBIT 31

[Illegible] the Commissioner of the General [illegible]

8 x United States Department of the Interior General Land Office Washington

Jul 3, 1931 In reply please refer to 1273037 "N" UEG United States vs. Ethel McGahen, et al. R. contest 11757. Locations null and void to the extent of the parties served. Adverse proceedings directed. Oil shale.

Register, By office letter "N" of June 30, 1930, adverse proceedings were directed against the Bute Nos 1 to 48 inclusive, oil shale placers, upon the charge:

"That annual assessment work to the value of $100 was not performed upon each or any one of the Butes Nos. 1 to 48 inclusive, oil shale placers, for the year ending July 1, 1929, and that work has not been since resumed."

* * * *

[1607] Notices of the charge issued by you and were served on eight of the ten claimants of record August 8, 1930, to October 30, 1930, and in your letter of January 15, 1931, you reported that the parties served with notices failed to file answers within the time allowed.

The failures of the parties served with notices 11757 44 [1608] to file answers denying the charge are taken as admissions by them of the truth thereof in view of which the Bute Nos. 1 to 48 inclusive, oil shale placers are declared null and void to the extent of their interests therein, and the United States has taken possession of the lands within the claims for its own uses and purposes.

* * * *

[1610]

PLAINTIFF'S EXHIBIT 32

Address only the [illegible] 4 x R 1 x C.F.D.
United States Department of the Interior General Land Office Washington
Nov 9 1931 In reply please refer to 1273037 "N" RLW
Oil shale R. contet 11757. Location null and void. Case closed.
Register, Denver, Colorado.

Sir:

* * * *

[1612] The failure of the contestees to file answers denying the charge are taken as admissions by them of the truth thereof, inview of which the Bute Nos. 1 to 48 inclusive, oil shle placers are declared null and void in their entiret and the United States has taken possession of the land within the claims for its own uses and purposes. The ase is closed.
Advise the parties hereof by ordinary mail.

Very respectfully,

Acting Commissioner.

Clerk's Note: Plaintiff's Exhibit No. 33—Letter to Register from Moore 6/30/30—appears in separate exhibit book.

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* * * *

[1615]

PLAINTIFF'S EXHIBIT 34

[Illegible] the Commissioner of the General [illegible] 7x 1x CFD

United States Department of the Interior General Land Office Washington
In reply please refer to 1273037 "N" RLW Oct 8 1931

Oil shale, R. Contest 11759. Locations null and void. Case closed.

Register, Denver, Colorado.

Sir: By office letter "N" of July 3, 1931, adverse proceedings were directed against the Atlas No. 1, Sec. 12, Nos. 2 and 3 Sec. 13, Nos. 4, 5 and 6, Sec. 11, Nos. 7, 8, 9 and 10, Sec. 14, Nos. 11, 12, 13 and 14, Sec. 10, Nos. 15, 16, 17 and 18, Sec. 15, T. 4 S., R. 95 W., 6th P. M., oil shale placers, upon the charge:

That annual assessment work to the value of $100 was not performed upon each or any one of the Atlas Nos. 1 to 18, inclusive, oil shale placers, for the year ending July 1, 1930, and that work had not been resumed on the Atlas Nos. 1 to 5, inclusive, 7 and 9 October 12, 1930, Nos. 6, 8, 10, 11, 13, 15 and 18 October 9, 1930, Nos. 12, 14, 16, 17 October 8, 1930, when challenges to the validity thereof were posted thereon on behalf of the United States.

Notices of the charge issued by you and were served on 7 of 8 parties reported as having interests in the claims 11759 40 [1616] on July 17, 18 and 20, 1931, and in your letter of August 29, 1931, you stated that no answers were filed by the parties served within the time allowed.

The failures of the contestees served with notices to file answers denying the charge were taken as admissions by them of the truth thereof, in view of which the Atlas Nos. 1 to 18, inclusive, oil shale placers are declared null and void to the extent of the interests of the parties served and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed to the extent of the interests of the parties served.

Advise the parties by ordinary mail.

Very respectfully,

Thos. C Havell
Acting Commissioner.

10-5 11759 39

Clerk's Note: Plaintiff's Exhibit No. 35—Letter ot Register from Moore 6/30/30—appears in separate exhibit book.

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* * * *

[1619]

PLAINTIFF'S EXHIBIT 36

[Illegible] only the Commissioner of the General [illegible] 7x 1x CFD

United States Department of the Interior General Land Office Washington
Oct 20 1931 In reply please refer to 1273037 "N" RLW
Oil shale. R. Contest 11761. Locations null and void. Case closed.
Register, Denver, Colorado.

Sir: By office letter "N" of July 6, 1931, adverse proceedings were directed against the Camp Bird Nos. 1, 2, 3 and 4,Sec. 2, Nos. 5, 6 and 7, Sec. 3, Nos. 8, 9, 10 and 11, Sec. 4, Nos. 12, 13, 14 and 15, Sec. 9, Nos. 16, 17 18 and 19, Sec. 16, and No. 20, Sec. 17, T. 4 S., R. 95 W., 6th P. M., oil shale placers, upon the charge:

That annual assessment work to the value of $100 was not performed upon each or any one of the Camp Bird Nos. 1 to 20, inclusive, oil shale placers, for the year ending July 1, 1930, and that work had not been resumed on the Camp Bird Nos. 1, 3, 4 and 6 August 9, 1930, No..2 August 12, 1930, Nos 5, 7, 8, 10, 12, 14, 16, 18 August 8, 1930, Nos. 9, 11, 13, 15, 17, 19, 20, August 3, 1930, when challenges to the validity thereof were posted thereon on behalf of the United States.

11761 34 42

[1620] Notices of the charges issued by you and were served on 7 of 9 parties reported as having interests in the claims on August 9, 25 and 26, 1931, and July 17, 1930, and in your letter of August 27, 1931, you stated that no answers were filed by the parties served within the time allowed.

The failures of contestees served with notices to file answers denying the charges were taken as admissions by them of the truth thereof, in view of which the Camp Bird Nos. 1 to 20, inclusive, oil shale placers are declared null and void to the extent of the interests of the parties served and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed to the extent of the interests of the parties served.

Advise the parties by ordinary mail.

Very respectfully,

Thos. C Havell
Acting Commissioner.

10-5 mvd 11761 33 41

[1621]

PLAINTIFF'S EXHIBIT 37

1186985 "N" MAS P. R. S. 4189

The Secretary of the Interior Washington
Nov 13 1930 2 - 205 Colorado Sears Goerner [names illegible] McDowell [names illegible]
The Honorable The Secretary of the Navy.
My dear Mr. Secretary:

* * * *

Adverse proceedings involving Oyler Nos. 1 to 4 inclusive, oil shale placers, were directed June 12, 1929, upon the following charge:

1. That assessment work to the value of $100 has not been done each and every year since the date of the leasing act.

In view of a recent decision by the Supreme Court, Wilbur vs. Krushnic (280 U. S. 306), this charge as it stands is ineffective. Before proceeding to a hearing it will be necessary to amend the charge by alleging default in annual assessment work as a present fact. It is probable that the Chief of Field Service has already directed an investigation as to the present status of the

Oyler claims in connection with the general investigation now in progress. However, his attention has been called to this particular matter and you will be further advised as soon as a report is received and action taken thereon.

Very truly yours,

(Sgd.) Ray Lyman Wilbur

Copy for Secretary's office To be always left on top. (Signed when rec'd in [illegible])

[1622]

PLAINTIFF'S EXHIBIT 38

MAS Address only the Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington

36980 In reply please refer to 1186985 "N" MAS Nov 12 1930 Instructions. [Stamp] Received Nov 17 1930 Denver Field Division General Land Office

Mr. A. D. Hathaway, Chief of Field Service, G. L. O., Denver, Colorado.

Sir: By letter "N" of June 12, 1929, adverse proceedings were directed against the Oyler Nos. 1 to 4 oil shale placers embracing lands in Secs. 10, 11 and 12, T. 6 S., R. 95 W., 6th P. M., lying within the limits of naval oil shale reserve No. 1 upon the following charge:

1. That assessment work to the value of $100 has not been done each and every year since the date of the leasing act.

In view of the Krushnic decision this charge is ineffective. In case you have not already given instructions for an investigation as to the present status of the Oyler claims, you will now issue such instructions in order that this office may take appropriate action with regard to the pending adverse proceedings.

[Stamp] Confidential not for public inspection BLM 331 44627 191

[1623] The Navy Department appears to be anxious to have the status of the claims determined.

Very respectfully,

Thos C Havell
Acting Commissioner.

11-11-ML

[Stamp] Confidential not for public inspection BLM 330 44627 190

Clerk's Note: Plaintiff's Exhibit No. 39—Letter to Walter Spencer from Moore 7/20/31—appears in separate exhibit book.

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* * * *

[1626]

PLAINTIFF'S EXHIBIT 40

United States Department of the Interior General Land Office Washington

In reply please refer to 1186985 "N" CRB 12/2/31
United States, contestant, vs. The Index Shale Oil Company, et al., contestees,
:R contest 12038 :Oil shale placers :null and void
Register, Denver, Colorado

Sir: Pursuant to instructions from this office, the Chief of Field Division, on July 20, 1931, filed adverse proceedings against the Oyler oil shale placers No. 1, NE ¼ Sec. 10, No. 2, W ½ NW ¼, N ½ SW ¼, Sec. 11, No. 3, E ½ NW ¼, W ½ NE ¼, Sec. 11, and No. 4, E ½ NE ¼ Sec. 11 and W ½ NW ¼ Sec. 12, T. 6 S., R. 95 W., 6th P.M., on the charge:

"That annual assessment work to the value of $100 was not performed upon each or any one of the said claims for the year ending July 1, 1931, that work has not since been resumed, and that by reason of said de-

fault the United States has taken possession of the lands within the claims for its own uses and purposes."

Service was had and on August 14, 1931, the Index Shale Oil Company, by H. L. Brown, agent, filed [1627] its answer denying the charge, alleging that the performance of annual labor is [?] that in the absence of a charge that the said claims were not validly existent on the date of the leasing act of February 25, 1920 (41 Stat. 437), the charges are wholly insufficient and immaterial, that it denies that the United States has taken possession of the lands for its own uses and purposes, and it demurs to the charge on the grounds stated.

* * * *

[1629] As to the failure to perform the assessment work for the year in question, it is contended that the United States is without authority or right to institute a proceeding of this character, or to otherwise question an oil shale claimant's failure to perform annual labor upon his claims.

The record shows that the Oyler Nos. 1,2,3, and 4, placers were located September 25, 1916, upon lands valuable for oil shale, under the provisions of

* * * *

[1631]

* * * *

the general mining laws.

* * * *

[1632] It is admitted that a challenge by the United States to the valid existence of the Oyler claims was made while the owners thereof were in default in the performance of the annual labor for the year ending July 1, 1931, and before work was resumed. The right of the Government to make such a challenge is clearly recognized by the Supreme Court.

The Oyler claims Nos. 1, 2, 3, and 4, are, therefore, held to be null and void.

Advise contestees hereof, and that in the absence of an appeal from this decision to the Secretary of the In-

terior within 30 days from notice, said decision will become final without further notice.

Very respectfully,

C. C. Moore
Commissioner.

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* * * *

[1639]

PLAINTIFF'S EXHIBIT 41

A. 16465. March 10, 1932 The Index Shale Oil Company, *et al*

"N" : 1186985. : : Oil shale placers held void. : : Affirmed.

Appeal from the General Land Office.

In the adverse proceedings brought against Oyler Nos. 1 to 4 oil shale placers, located on lands in T. 6 S., R. 95 W., 6th P.M., Colorado. The Index Shale Oil Company *et al.*, claimants thereof, admitted by stipulation the charge that the required assessment work for the year ending July 1, 1931, had not been performed upon any of the claims above mentioned and that such work had not since been resumed.

The claimamts, however, demurred to the charge, contending, among other things that it did not constitute a cause of action; that it alleges only that the work was not performed *upon* any of the said claims for the year ending July 1, 1931, while the mining law permits [1640] assessment work to be done for the benefit of claims even though not actually done upon them, and until it is alleged that no assessment work was done either upon or for the benefit of said claims the charge is wholly insufficient and immaterial. It was further contended in support of the demurrer that the United States can not take advantage of the defaults in the performance of assessment work and that the Department has, therefore,

no jurisdiction to adjudge the matter stated in the charge, the same being wholly immaterial and insufficient.

* * * *

[1641] As to the other contentions they present no question of any importance that was not fully considered and rejected in *Federal Oil Shale Company*, decided November 11, 1930 (53 I.D. ——) and in like cases following.

The Commissioner's decision is accordingly affirmed.

(Signed John H. Edwards
Assistant Secretary

Clerk's Note: Exhibit 42, Photostat of letter to Register from Moore 1/20/32, is in separate Exhibit Book.

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* * * *

[1651]

PLAINTIFF'S EXHIBIT 43

The Secretary of the Interior Washington

Graves Finney (name illegible) (name illegible) 2-13 gs Oil Shale Mar 16 1933

The Honorable The Attorney General.

My dear Mr. Attorney General: The Supreme Court of the District of Columbia, on March 10, 1933, in the case of *Virginia-Colorado Development Corporation* v. *Ray Lyman Wilbur, Secretary of the Interior*, No. 55221 Equity, entered a decree ordering that a writ of injunction issue to the Secretary of the Interior requiring him, among other things, to vacate and set aside certain proceedings of the General Land Office preferring charges against and holding void the claim of plaintiffs to oil shale placer locations described in said decree. The case has been revived in the name of the present Secretary of

the Interior. A copy of the decree and of all other pleadings is inclosed herewith for your information.

* * * *

[1652] In the case just decided, however, there was and has been no resumption of work, and no application has been made for patent. During the existence and continuance of default in performing assessment work the Government challenged the valid existence of plaintiff's claim. The procedure was in accordance with the usual method prescribed by the rules and regulations of the Secretary of the Interior for preferring charges against, and challenging unperfected claims to the public domain when unoccupied by the claimant and apparently abandoned. This action is identical with that previously taken in other cases and is based on the suggestion in the Krushnic case, that "at least some form of challenge on behalf of the United States to the valid existence of the claim" should precede resumption of work.

* * * *

This case may be regarded as a test case. Many tracts of oil shale land of the public domain, once embraced in a location under the general mining laws, now lie wholly inactive through failure of the locators to perform any assessment work or other improvement or development thereon. Such tracts can not be leased under the act of February 25, 1920, if the locator may continue inactive for an indefinite period, and as a matter of right, reassert his claim by resuming work at will. Title thereby will remain clouded indefinitely.

It, therefore, is desirable that the Court of Appeals of the Destrict of Columbia review this decision. I request you, as has been usual in similar cases, to authorize the Clerk of that Court to treat the appeal as a Government case in so far as court costs and the printing of the record are concerned.

* * * *

Very truly yours,

(Sgd) Harold L. Ickes

Inclosure No. 180726.

[1653] PLAINTIFF'S EXHIBIT 44

Summaries of Bureau Reports Interior Ann Rep fy (number illegible)

* * * *

Contests against oil-shale locations.—Action has been suspended since April 1, 1933, awaiting court decision on jurisdiction of the Department to challenge the validity of oil-shale locations for failure to perform annual labor thereon. There are pending 503 Government contests against such locations.

* * * *

[1655] PLAINTIFF'S EXHIBIT 45

Department of the Interior Washington Aug 13 1935 A. 17108. Address only the Secretary of the Interior United States v. *Elizabeth E. Wright* et al. 10-3 General "N" : 1327376. : Oil shale placers held void. : Reversed.

Appeal from the General Land Office.

* * * *

Adverse proceedings were brought against the claims June 5, 1929. Some of the charges as subsequently amended and supplemented were to the effect that the annual assessment work had not been performed on certain of the claims for the years 1929 and 1931, and that work had not been resumed prior to notice and repossession of the land by the United States.

* * * *

[1658] In view of the pendency of a suit in the courts of the District of Columbia, brought against the Secretary of the Interior by the Virginia-Colorado Development Corporation Challenging the authority of the Department to institute proceedings against a mining claim for failure to perform the required assessment work thereon, and to declare a forefeiture of such a claim in the event the work required had not been done, action on

this appeal was stayed pending the outcome of the suit mentioned.

[1659] Final decision on the question was rendered by the Supreme Court on June 3, 1935, in the case styled, *Harold L. Ickes, Secretary of the Interior*, v. *Virginia-Colorado Development Corporation*, wherein it was held that the plaintiff lost no rights in its claim by failure to do the assessment work; that such failure gave the Government no right of forfeiture; that the Department's challenge, its adverse proceedings charging such failure, and its decision thereon, went beyond the authority conferred by law. In harmony with the ruling of the court, the Department, by decision of June 24, 1935, in a case of the Shale Oil Company, held the proceedings, instituted in that case against certain oil shale claims based upon alleged defaults in the performance of assessment work, were without authority of law and overruled its previous decisions maintaining the contrary.

It follows that the charges in the present case, relating to the nonperformance of assessment work, were preferred without authority of law, and in so far as the Commissioner's decision declares the claims forfeited because of failure to do assessment work thereon, or failure of the mining claimants to respond to such charges, it is without legal effect. With respect to Charges 3 and 4 as above set forth, the failure of the defendants to appear at the hearing ordered, without showing good cause therefor, or to [1660] submit a statement of fact rendering the charges immaterial, would, under the applicable regulations (Par. 10, Circular 460, 44 L. D. 572), be taken as a confession of the truth thereof and obviate the necessity for the Government to submit testimony in support of such charges.

* * * *

[1664] T. A. Walters

105224 First Assistant Secretary.

[1665] PLAINTIFF'S EXHIBIT 46

United States Department of the Interior Office of the Secretary Washington May 26 1934

(name illegible) Thomas Taylor 10/3 General

Dr Ralph H. McKee, Department of Chemical Engineering, Columbia University, New York, New York.

My dear Doctor McKee: I have your letter of May 15 relating to your request for oral argument in connection with the appeal of the *Shale Oil Company* from a decision of the Commissioner of the General Land Office, holding certain oil shale claims of the company void because of failure to perform annual assessment work on or for the benefit of the claims.

The question whether the Department has authority to forefit oil shale placer claims by reason of default in the performance of assessment work has recently been answered in the negative by the Court of Appeals of the District of Columbia in the case of *United States* v. *Virginia-Colorado Development Corpartion*, but a petition for certiorari filed by the Government in that case was granted by the Supreme Court on May 21.

In conformity with the usual practice, where questions of law pending on appeal in the Department have been submitted to the arbitrament of the courts, disposition of appeals involving the same questions is deferred pending the outcome of the court proceedings. The appeal of the Shale Oil Company and others raising the same questions will therefore not be disposed of until the final outcome in the Supreme Court of the case there pending.

* * * *

Sincerely yours,

(SGD) T. A. Walters
First Assistant Secretary.

[1666] PLAINTIFF'S EXHIBIT 47

Department of the Interior Memorandum for the Press U.S.F.S. Received Public Relations Feb 14 1931 File Clerk (initials illegible) Immediate Release February 12, 1931.

Secretary Wilbur today made the following statement of the Senate Committee on Public Lands

* * * *

[1667] As to oil shale land, the question of the Department's jurisdiction was, when I took office, under review by the Courts in the case of Wilbur vs. Krushnic. The decision of the Court of Appeals in that case had held on January 7, 1929, that the Department was without authority to interfere with the passage to private title of oil shale lands under the mining laws or to repossess defaulted claims. The Supreme Court decision in that case came down on January 6, 1930, affirming the Court of Appeals of the District of Columbia and directing mandamus to issue against me compelling the issuance of an oil shale patent in that test case. The Supreme Court in its decision, however, mentioned the fact that no "challenge" against that particular claim had been asserted by the Government. In order to test out the extent of the authority (if any) left to us by the Sumpreme Court decision I immediately directed the repossession by posting of notices on all oil shale claims then in default in assessment work. To date over 6,400 of them have been posted.

* * * *

[1668] As to oil shale lands, unlike the case of oil prospecting permits, the Secretary is, under the law, without discretion to refuse the application for patent if the law has been complied with. I have not had the legal power to reject any application for patent on grounds of policy; whereas between March 4, 1929 and June 30, 1930, some 5,790 applications for prospecting permits had been rejected, and 13,394 canceled, because the Mineral Leasing Act does permit the Socretary discretionary powers as to issuance of prospecting permits.

* * * *

[1674] PLAINTIFF'S EXHIBIT 48

United States Department of the Interior Office of the Secretary Washington Sep - 9 1930 A-15048. 10-3 Duncan

Messrs. C. S. and G. K. Thomas, Attorneys at Law, Denver, Colorado.

Gentlemen: I have your letter of August 22, 1930, requesting oral argument before the Department in connection with the appeal of the Federal Shale Oil Company from the decision of the Commissioner of the General Land Office dated March 27, 1930, overruling your demurrer to the charge of default in assessment work on an oil shale claim involved in Government Contest, Denver 12264.

* * * *

It is well to mention here that the principal question raised in your appeal as to the jurisdiction of the Department to declare an oil shale claim void for default in the performance of annual assessment work has been raised in other pending appeals, and it seems it would be mutually advantageous to both the Government and the claimants who are charged with such defaults, and it would expedite the disposition of such cases, if those who desire an oral argument would appear on the same day.

* * * *

[1675] Very truly yours,

(Sgd.) John H. Edwards
Assistant Secretary.

[1676] PLAINTIFF'S EXHIBIT 49

G.L.O. 1497564 "N" CRB (names illegible) Chapmen May 26 1933 2-139 Oil Shale

Mr. Eli F. Taylor, Register, United States Land Office, Salt Lake City, Utah.

My dear Mr. Taylor: I have your letter of May 11, in which you recommend that the Department sponsor legis-

lation which you believe would nullify defaulted oil shale placer mining claims without expense to the Government, and in which you refer to the expense incident to the present method of posting notices of forfeiture on the land and the difficulty in securing service of notice upon claimants.

The question of the right of this Department to proceed against such claims is involved in the case of Virginia-Colorado Development Corporation vs. United States which is now before the United States Court of Appeals of the District of Columbia, on appeal prosecuted by the Government.

In view of the pendency of this suit, it appears advisable to await final decision in the case before consideration is given to the matter of securing additional legislation of the nature you suggest.

Sincerely yours,

(Sgd) Harold L. Ickes
Secretary of the Interior.

Dep't of the Interior, Received May 23 1933 Secy's Office. Apps., Mails & Files
ect

[1677] PLAINTIFF'S EXHIBIT 50

The Secretary of the Interior Washington Feb-6 1934 Faky Margold Walters (names illegible) 2-139 Oil Shale

The Honorable The Attorney General.

My dear Mr. Attorney General: On January 22, 1934, in the case of Harold L. Ickes, as Secretary of the Interior v. Virginia-Colorado Development Corporation, No. (illegible), the Court of Appeals of the District of Columbia affirmed a decree of the Supreme Court of the District of Columbia which granted a mandatory injunction against the Secretary of the Interior requiring him to vacate a decision promulgated by him declaring certain oil shale placer claims of the Corporation null and void.

It is requested that proper steps be taken to obtain a review of this decree by the Supreme Court of the United States.

* * * *

It is of importance to this Department that an authoritative determination of the issues in this case be obtained. Many tracts of land of the character of those now subject to the lessing act of February 25, 1920, which were embraced in locations under the placer mining laws at the time of the passage of the leasing act, now lie inactive through failure of the locators to perform any assessment work or undertake any development thereof. Such tracts cannot be leased under the act of February 25, 1920, if the locator [1678] may at any time reassert his claim by renewing the performance of assessment work, and title to these tracts may therefore remain clouded indefinitely.

* * * *

Sincerely yours,

(Sgd) Harold L. Ickes
Secretary of the Interior.

Inclosures 180584

[1679] PLAINTIFF'S EXHIBIT 51

PRS No. (illegible) Department of the Interior Washington Oct 23 1918 806381 10

Mr. J. B. Benson, 822 McIntyre Building, Salt Lake City, Utah.

Dear Mr. Jenson: I am in receipt of your letter dated October 2, 1918, and making inquiry as to the necessity for performing annual assessment work on some oil shale lands in Wyoming, which you and associates are claiming under placer mining locations made in 1917 and 1918.

* * * *

[1680] As a general rule matters involving questions of assessment work on mining claims arise between adverse claimants to the same mineral land and go only to the right of possession, the determination of which is committed exclusively to the courts.

Cordially yours,

(Sgd.) Franklin K. Lane

10-11 lbk

[1681] PLAINTIFF'S EXHIBIT 52

January 20, 1919 Mr. Chris C. Dere Grand Valley, Colorado

My dear Sir:

* * * *

[1682] The annual expenditure on unpatented mining location required under Section 2324 U.S. Revised Statutes, and commonly called annual assessment work, is, with the exception of certain phosphate locations affected by a special act of Congress, solely a matter between rival or adverse claimants to the same mineral land, and goes only to that right of possession, the determination of which is committed exclusively to the courts. In other words, the non-performance of assessment work renders the land subject to adverse relocation provided work is not resumed [1683] by the original locator before a relocation is made, but ordinarily, whether or not an applicant for mineral patent has performed assessment work on his claim during the years he has held the same, does not affect the patent procedure.

* * * *

Very respectfully,

Acting Assistant Commissioner

1-15-mem

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* * * *

[1688] PLAINTIFF'S EXHIBIT 53

United States Department of the Interior Office of the Secretary Washington Jun-2 1933 A-17108. Duncan Thomas McDowell 10-3 General

Clarence E. Taylor, Esq., Suite 951 Otis Building, 10 South LaSalle Street, Chicago, Illinois.

My dear Mr. Taylor: I have your letter of May 19, 1933, addressed to my immediate predecessor, stating that John L. Steele, Esq., has beeen authorized by you to represent the defendant in an oral argument before me in the case of United States v. Elizabeth E. Wright, Appeal No. A-17108, and requesting that the matter be set for argument at an early date.

An examination of the appeal discloses that the principal question presented relates to the jurisdiction of the Department to entertain inquiry as to the performance of annual assessment work on oil shale placer locations and to declare such claims void where a default in the performance of such work is established.

Inasmuch as this question is now involved in the case entitled Harold L. Ickes v. Virginia-Colorado Development Corporation, pending in the Court of Appeals of the District of Columbia, it is suggested that the oral argument be deferred until a final disposition of this case is made in the courts.

Very truly yours,

Oscar L. Chapman
Assistant Secretary.

Copy to John L. Steele, Esq.

[1689] PLAINTIFF'S EXHIBIT 54

Address only the Commissioner of the General Land Office United States Department of the Interior General Land Office Washington Jun 28 1935 (initials

illegible) In Reply Please Refer to 1607437 "N" CRB Information.

Mr. W. J. Owen Lock Box 218, Victorville, California.

My dear Sir:

* * * *

[1690-A] It is possible if you left your claims in 1925 and have not since performed assessment work thereon that they have been relocated, but as also stated in the paragraph referred to, "The determination of the question of the right of possession between rival or adverse claimants to the same mineral land is committed exclusively to the court". Matters of trespass, thievery etc., such as those referred to in your letter, are also committed to the jurisdiction of the court, being punishable only under the laws of the state. As this office has no jurisdiction in the matters mentioned in your letter it will not undertake to advise you in that regard.

Very respectfully,

Fred W. Johnson
Commissioner.

6-26 edt

[1691] PLAINTIFF'S EXHIBIT 55

July 25, 1935 1511906 "N" ORB Information

Mr. W. W. Gowin, Monticello, Utah

My dear Sir: Replying to your letter of July 20, 1935, you are advised that this office has no juristiction over questions relating to the performance of annual assessment work on mining claims, such questions being committed exclusively to the courts.

* * * *

[1692] Very respectfully,

/s/ Fred W. Johnson
Commissioner

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[1696] PLAINTIFF'S EXHIBIT 56

July 26, 1935 1610298 "N" CRB Information.

Mr. George Van Dorsten, Auburn, California.

My dear Sir:

* * * *

It appears from the enclosures with your letter, which are herewith returned, that the relocation of your claims was made because of an alleged failure to perform the annual assessment work for the year ending July 1, 1934, or to file the notice required by the act of May 15, 1934. [1697] This office has no jurisdiction over the matter mentioned and it, therefore, will not undertake to advise you in that regard.

* * * *

Very respectfully,

/s/ Fred W. Johnson
Commissioner

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* * * *

[1701] PLAINTIFF'S EXHIBIT 57

Address only the Commissioner of the General Land Office United States Department of the Interior General Land Office Washington Jul 20 1935 In Reply Please Refer to 1610642 "N" CRB Information.

Mr. Willard S. Boeher, San Fernando, California.

My dear Sir: Replying to your letter of July 16, 1935, addressed to the Secretary and referred here by the Bureau of Mines, you are advised that this office has no jurisdiction over questions arising out of a failure to perform the annual assessment work on mining claims.

* * * *

[1702] Very respectfully,

Fred W. Johnson
Commissioner.

[1703] PLAINTIFF'S EXHIBIT 58

Address only the Commissioner of the General Land Office United States Department of the Interior General Land Office Washington Jul 20 1935 In Reply Please Refer to 1566740 "N" CRB Information.

Mr. Stephen O. Chappell, Box 47, Route # 2, Derita, North Carolina.

My dear Sir: Replying to your letter of July 23, 1935, you are advised that this office has no jurisdiction over the matter of the performance of annual assessment work on mining claims and no authority to suspend the requirements of the United States mining laws relating to the performance of such work. These requirements can only be suspended by act of Congress.

* * * *

[1704] Very respectfully,

Fred W. Johnson
Commissioner.

7-27-gmr

[1705] PLAINTIFF'S EXHIBIT 59

(illegible) PRS 2647 23 1/28/48 (Illegible) Office of the Secretary Washington 25, D. C. Feb 11 1946 Rewritten in the Solicitor's Office 2-139 General Bradshaw Johnson Nolan (names illegible)

Interior Dept Feb 10 1948 Secretary's Mail Center

My dear Senator Ecton: Reference is made to your letter of January 19 asking if the cost of geophysical work may be applied toward the annual assessment work required to be performed on mining claims, or toward satisfying the requirement that (illegible) worth of labor be expended or improvements made upon each mining location embraced in an application for patent.

The failure to perform the annual assessment work for the benefit of a valid mining location has no effect as against the United States but only renders the claim subject to loss through relocation by another claimant if the

work is not commenced or resumed before such relocation. Therefore, the question of whether the work done is of a nature that would be considered assessment work is not one within the jurisdiction of this Department but is for the appropriate court to determine should litigation arise between the claim holder and another claimant making a relocation of the same ground. See Ickes v. Virginia Colorado Development Corp., 295 U. S. 639.

* * * *

Sincerely yours,

(sgd) Oscar L. Chapman
Under Secretary of the Interior.

[1706] PLAINTIFF'S EXHIBIT 60

* * * *

Instructions. May 10, 1920.

Act of February 25, 1920—Oil Shale Placer Claims. Oil shale having been recognized by both the Department and Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands valuable on account thereof must be held to be subject to valid location and appropriation under the placer-mining laws to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas.

Vogelsang, First Assistant Secretary: The Department is in receipt of your [Commissioner of the General Land Office] memorandum dated April 20, 1920, stating that your office has before it for consideration the first application for patent for oil shale placer claims, the same being Glenwood Springs mineral entry 015847 by Verner Z. Feed and James Doyle for fourteen placer mining claims covering 2,210 acres now situate in Naval Oil Shale Reserve No. 1, created by Executive order of December 6, 1916.

You refer to the provisions of the leasing law of February 25, 1920 (41 Stat., 437), relating to oil shale de-

posits, and state that you deem the matter of sufficient importance to warrant its submission for instructions of the Department.

The entry in question was allowed February 25, 1919, for the La Paz Nos. 1 to 14, inclusive, placer mining claims, survey No. 19837, situate in what, if otherwise surveyed would be parts of Secs. 14 to 20, inclusive, 22, and 23, T. 6 S., R. 95 W., 6th P. M., Parachute mining district, Glenwood Springs, Colorado, which claims purport to have been located November 14, 1912, on account of "petroleum and other mineral oils, oil shales, hydrocarbons and related materials," each by eight persons.

By section 2319 of the Revised Statutes it is provided that: All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

And by the act of February 11, 1897 (29 Stat., 526), it is provided: That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims.

Oil shale has long been recognized as a valuable mineral deposit and for many years the mining of such deposits and the distillation of petroleum and other mineral substances therefrom has been an extensive industry in Scotland, that has afforded employment to many people and produced large dividends. While there are no oil shale operations in the United States that have reached that point of commercial development or production, a reference to departmental publications indicates that there is great activity, particularly in the States of Colorado, Utah, Montana, Nevada, and California, looking to such development and production at places where there are large and easily accessible deposits of rich oil shale,

and that some shale oil has been produced. It is reported that several small plants have been already completed, or are under construction, near DeBeque, Colorado, which is only a short distance from the land included in the entry of Reed and Doyle.

The Department has had numerous inquiries as to the locatability and patentability of such deposits under the mining laws and in response thereto, while disclaiming any intention of expressing a binding opinion in the premises, it has nevertheless declared itself as favorable to the view that such deposits, if valuable, are subject [1707] to location and purchase under the mining laws. In a letter dated May 16, 1916, addressed to Senator Myers the Department said that:

* * * it would seem that a discovery by competent locators, locating in good faith, of oil shale, upon the unreserved, unappropriated and unwithdrawn public domain, capable, by approved methods, of yielding oil in sufficient quantities so as to make the land chiefly valuable therefor, would be a sufficient compliance with the provisions of said oil placer act of 1897, and that locations based upon such a discovery must be made and entered, if at all, under the provisions of said act of 1897.

In a letter dated December 26, 1917, addressed to Representative W. A. Ayers, it was said:

Large areas of land in Colorado, Utah, and Wyoming have been classified by the Department as mineral land valuable for oil shale. The lands so classified, except two small (illegible), one each in Colorado and Utah which have been set aside as naval oil shale reserves, are open to mineral entry under the mining laws of the United States and to nonmineral entry in accordance with the provisions of the act of July 17, 1914, the shale deposits when entries are made under this act being reserved for separate acquisition under the mineral land laws.

In a letter dated April 11, 1918, addressed to Mr. Fred L. Morris, Lawrence, Kansas, it was said that:

* * * if these deposits of oil shales are valuable they are now subject to location and entry under the mining laws by citizens of the United States.

And in a letter dated June 30, 1919, addressed to Mr. Hal P. Wilson, Detroit, Michigan, it was said:

The lands included in Naval Oil Shale Reserve Colorado No. 1 and Utah No. 2 were withdrawn from appropriation and reserved for the United States Navy, and are not subject to location or the acquirement of any rights under the United States public-land laws while the withdrawal remains in force. If valid claims have been initiated prior to the withdrawal and have been maintained in accordance with law, they are protected under the terms of the withdrawal act of June 25, 1910 (36 Stat., 817), but I am not advised as to whether any portions of the withdrawn lands are so held.

In the letter of the Director of the Geological Survey of May 23, 1916, addressed to you and advising you of the classification of certain areas, including that embraced in the said entry of Reed and Doyle, the Director said:

The net result of oil shale investigations already made is that the oil-shale areas in Colorado, Utah, and Wyoming constitute a latent petroleum reserve whose possible yield is several times the estimated total remaining supply of petroleum in the United States.

While the data at hand are not sufficient to warrant a specific statement as to the total recoverable nitrogen content of these shales, it is believed possible that this will prove so large as to give these deposits a value as a source of nitrogen equal to their value as a source of petroleum.

In view of the high prospective mineral value of lands underlain by oil-shale deposits it is of course apparent that they should not be permitted to be acquired under the nonmineral land laws. The lands have not been recommended for withdrawal because the oil-shale industry is not yet developed in the United States, and as it is desired to give opportunity for the establishment of experimental plants, it is believed the lands should remain open for the present to acquisition under the mineral-land laws, even though they are ambiguous and but poorly adapted to deposits of this type.

Accordingly, I hereby classify the tracts listed below as mineral lands, valuable as a source of petroleum and nitrogen, and request that you make the proper notation of the classification upon your records.

Such classifications of lands containing oil shale have been accepted by the Department as prima facie evidence of the value of the lands so classified for mining purposes so as to require agricultural entrymen therefor to accept restricted patents to their claims under the provisions of the act of July 17, 1914 (38 Stat., 509), or assume the burden of establishing their nonmineral character.

In his letter of November 15, 1916, transmitting to the Department a proposed Executive order for the creation of Naval Oil Shale Reserve No. 1, Colorado No. 1, embracing approximately 45,400 acres, and including the land applied for by Reed and Doyle, the Director of the Geological Survey said: "The Colorado area is near transportation, and includes a part of the richest of the known shale deposits."

By section 37 of the leasing act of February 25, 1920, it was provided:

> That the deposits of * * * oil, oil shale, and gas herein referred to, in lands valuable for such minerals, * * * shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at the date of the passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

Oil shale having been thus recognized by the Department and by Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands valuable on account thereof must be held to have been subject to valid location and appropriation under the placer mining laws, to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas. Entries and applications for patent for oil shale placer claims will, therefore, be adjudicated by your office in accordance with the same legal provisions and with refer-

ence to the same requirements and limitations as are applicable to oil and gas placers.

The record of the entry accompanying your memorandum is returned for such adjudication.

* * * *

[1713] PLAINTIFF'S EXHIBIT 62

Hon Lawrence C. Phipps, United States Senate.

My dear Senator: Answering your inquiry as to whether decision by First Assistant Secretary in the case of the Reed Doyle oil shale placer mining claims has my approval, I have to advise you that the decision in question was prepared after careful study of the mining laws and decisions by the legal force of this Department, and in the unanimous opinion of that force was the only conclusion which could be reached under the law and the facts. No reasons have been presented to me which would warrant the view that the conclusion was incorrect.

Cordially yours,

(Sgd.) John Barton Payne
Secretary.

(initials illegible)

[1714] PLAINTIFF'S EXHIBIT 63

Motion for Summary Judgment

Comes now the defendant, United States of America, by and through A. Pratt Kesler, United States Attorney for the District of Utah, and Llewellyn O. Thomas, Assistant United States Attorney for said District, and hereby moves the above Honorable Court to enter summary judgment in favor of defendant in the above-entitled cause, such motion being filed herein in accordance with the provisions of Rule 56(b) and (c), Federal Rules

of Civil Procedure, and defendant respectfully represents and says to the court that the pleadings on file and the affidavit of H. Byron Mock attached hereto show that defendant is entitled to judgment as a matter of law upon the following grounds and for the following reasons, to-wit:

1. According to plaintiff's complaint this action is based upon the provisions of Title 28, Section 1346(b), United States Code Annotated, and the said action is barred by the provisions of Title 28, Section 2680(a), United States Code Annotated.

Dated this 15th day of April, 1955.

A. Pratt Kesler
United States Attorney

Llewellyn O. Thomas
Assistant United States Attorney
Attorneys for Defendant

* * * *

[1715] Affidavit State of Utah County of Salt Lake ss.

H. Byron Mock, being first duly sworn, on oath, deposes and says:

1. During the years 1952 and 1953, the period involved in the above-entitled action, as appears in plaintiff's complaint, he was employed by the defendant as Regional Administrator in the Bureau of Land Management, United States Department of the Interior, under the direction of the Secretary of the Interior, and his assistants, with offices in Salt Lake City, Utah, and during the said two years as such Regional Administrator in said Bureau he was in charge of the administering and supervising of grazing on the surface of public lands in Region IV located within the States of Utah and Colorado, which included grazing District No. 7 within the State of Colorado;

2. Pursuant to and in accordance with the authority granted to the Secretary of the Interior of the United States of America by Act of United States Congress of June 28, 1934, 48 Stat. 1269, Title 43, Section 315, et seq., called Taylor Grazing Act, and for the purpose of permitting the use of the surface of the lands therein described for grazing under the supervision and control of the United States Department of the Interior, on to-wit, October 12, 1940, there was duly established, by order of A. J. Wirtz, Acting Secretary of the Interior, of the United States of America, Grazing District No. 7, in the State of Colorado, embracing, among other lands, the lands located in Township 5 South, Range 100 West, 6 P. M. described in paragraph 5 of plaintiff's complaint, and notice thereof was duly published in the Federal Register of Tuesday, October 22, 1940, on [1716] pages 4179, 4180 and 4181 thereof, in accordance with the Federal Register Act, approved July 26, 1935, (49 Stat. 500, Title 44, Section 305, et seq., U.S.C.A.);

3. During the said years 1952 and 1953 there was in full force and effect in the said Bureau of Land Management the administrative practice and policy as to the control and regulation by the United States Government of grazing on the surface of unpatented mining claims, including the claims described in plaintiff's complaint, established by and operated under the hereto attached memorandum approved by the Assistant Secretary of the Interior on January 3, 1946, and the hereto attached memorandum approved June 9, 1947, by the Acting Secretary of the Interior, which in the years 1952 and 1953 were a part of the duly established rules, regulations and directives under which the Bureau of Land Management did control and regulate the grazing of the surface of unpatented mining claims, as shown on the attached forms numbered 4-1096 and 4-1180;

4. All acts performed by the employees of defendant, named in plaintiff's complaint, in respect to the grazing of the surface of the unpatented mining claims described in plaintiff's complaint in the said years 1952 and 1953 were performed by said employees pursuant to and in the execution of the rules, regulations, and directives of

the Bureau of Land Management, United States Department of the Interior, of which the said establishment of said Grazing District No. 7 and the said attached memoranda are a part.

H. Byron Mock

Subscribed and sworn to before me this 15th day of April, 1955.

Lucy S. Taylor
Notary Public, residing at:
Bountiful, Utah

My Commission Expires:

[1717] Copy United States Department of the Interior Grazing Service Office of the Director Salt Lake City 9 Box 659 December 3, 1945

Memorandum for the Secretary:

Orderly administration of the grazing districts established since June 28, 1934, under the provisions of the Taylor Grazing Act, comprising large areas of the public domain in western Colorado, eastern Utah and southern Wyoming, has been affected seriously by the practice of numerous unpatented oil shale mining claimants leasing the located lands to stockmen for grazing purposes. The administrative difficulties resulting from the practice have long been a serious problem. A solution has been diligently sought by the Grazing Service. The unsatisfactory situation persists and becomes more acute from year to year.

The mining locations in question were initiated under the placer mining laws prior to the enactment of the Mineral Leasing Law of 1920, and little or no annual assessment work or other mining work has since been performed upon the claims and cannot be required by the Government under existing law as announced in decisions of the Supreme Court of the United States in the cases of Wilbur v. Krushnic, 28C U.S. 306 (1930), and Ickes v. Virginia-Colorado Development Corporation, 295 U. S. 639 (1935), holding that failure to perform such work

did not render the claims invalid, but merely subjected them to loss through relocation by another claimant.

Since the existing United States mining laws do not require mining locations to be recorded on the records of the General Land Office or of its district offices, there are virtually thousands of these mining locations of which the Department has little or no knowledge. The only source of information, other than such marks as may appear upon the ground, is the county records in those cases where the claims have been recorded, and it would be impractical for the Grazing Service to make examinations and attempt to determine the respective rights of the numerous locators in view of the many conflicting claims.

Legislation has been proposed by the Department which would require the oil shale claimants to file notice of their intention to [1718] hold and develop the claims. In other words, it would require them to place the claims of record with the Federal Government. The proposed legislation (S. 1139, 78th Congress, 1st Session) was discussed extensively before a Subcommittee of the Committee on Public Lands and Surveys under Senate Resolution 241, extended, at Denver, Colorado, on November 15 and 16, 1943. The proposed legislation has not been enacted.

* * * *

Following a conference in the Solicitor's Office, attended by members of the staff and representatives of the General Land Office and the Grazing Service, it was agreed that in the circumstances it would be advisable that the Department establish the administrative practice of not recognizing any rights in the mining locators to the surface resources, except such as may be required for actual mining purposes and that permits or licenses to utilize the grazing resources be issued under the Taylor Act and the Federal Range Code to qualified livestock owners, with the inclusion in the present form of grazing permits or licenses of suitable provisions to that effect. It is therefore recommended that the present forms used in the issuance of grazing permits or licenses be amended to include the following or similar language:

"This permit or license applies to all Federal range within the area described, including the surface of unpatented mining locations or claims not needed by the locator of mining purposes or in extracting and removing the mineral deposits therein. It is understood that the permitee or licensee will exercise due care not to disturb or damage any mining improvements thereon and that he will be responsible for any damage to such mining improvements resulting from the grazing of his livestock upon any such claims under this permit or license."

If you approve of this procedure, it is believed that it will be of material help in the administration of the large areas in grazing districts included in numerous unpatented mining claims. In the event the suggested procedure would in any case result in litigation between the mining locators and the grazing permittees, steps may be taken through intervention on behalf of the Government, to [1720] secure a judicial determination of the respective rights of the Government and all the parties concerned, and of other important questions which should be settled as early as practicable.

/s/ C. L. Forsling
Director of Grazing

Approved: January 3, 1946

/s/ Oscar L. Chapman
Assistant Secretary

[1721] Copy Bureau of Land Management Washington 25, D.C. June 3, 1947

Memorandum To: The Secretary of the Interior From: Director Subject: Grazing on unpatented mining claims

Reference is made to a memorandum from the former Director of Grazing, approved by the Assistant Secretary on January 3, 1946, in which the Department established the administrative practice of not recognizing any rights in the mining locators to the surface resources, except such as may be required for actual mining operations and

that permits or licenses to use the grazing resources be issued under the Taylor Act and the Federal Range Code to qualified livestock owners, with the inclusion in the present form of grazing permits or licenses of suitable provision to that effect. The present forms used in the issuance of grazing permits or licenses are to be amended to include the following or similar language:

"This permit or license applies to all Federal range within the area described, including the surface of unpatented mining locations or claims not needed by the locator for mining purposes or in extracting and removing the mineral deposits therein. It is understood that the permitee or licensee will exercise due care not to disturb or damage any mining improvements thereon and that he will be responsible for any damage to such mining improvements resulting from the grazing of his livestock upon any such claims under this permit or license."

We recommend a change in the wording of this added provision by deleting therefrom "and that he will be responsible for any damage to such mining improvements resulting from the grazing of his livestock upon any such claims under this permit or license."

The Bureau is not in a position to demand that either the livestock or the mining industry satisfy the other in cases in which [1722] damage may result from joint-use operations upon the public lands. The Bureau is in a position, however, to direct its grazing licensees and permittees to exercise due care not to disturb or damage mining improvements, and this has been accomplished in the amended provision.

/s/ Thos. C. Havell
Assistant Director

Approved: June 9, 1947

/s/ Oscar L. Chapman
Acting Secretary of the Interior

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[1726] PLAINTIFF'S EXHIBIT 65

(Illegible) Requests United States Department of the Interior GEW General Land Office District Land Office Salt Lake City, Utah. June 15, 1935.

Commissioner, General Land Office, Washington, D. C.

Sir: In a recent newspaper dispatch we noted that the Supreme Court had held invalid all of the proceedings looking to disposing of oil shale placer claims where the regular assessment work had not been performed.

As you know there are very many uncompleted adverse proceedings in this office. We would be pleased to be advised as to the disposition of these papers.

If disposition of these papers may be had by transmittal to your files the space now occupied by these papers could be used to advantage for the grazing files referred to under paragraph "f" of circular 1356.

I would appreciate early answer to this letter.

Very respectfully,

Thomas F. Thomas
Register.

(illegible) Jun 17 1935 (illegible)

[1727] PLAINTIFF'S EXHIBIT 66

June 24, 1935 Mr. Joseph Bellis, Secy. The Parachute Mining District, Grand Valley, Colorado Oil Shale.

My dear Sir: I have received your letter of May 25, 1935, concerning the Little Jim, Nos. 2, 7, 8, 9, 10 and 11, oil shale placer claims.

You are advised that on June 3, 1935, the Supreme Court of the United States held in the case of Harold L. Ickes, as Secretary of the Interior, v. Virginia-Colorado Development Corporation, that the Department's challenge and adverse proceedings against the oil shale placer

claims involved went beyond the authority conferred by law. Accordingly, action on oil shale cases will remain suspended until final action is taken by the Department in the above mentioned case.

Very respectfully,

/s/ Fred W. Johnson
Commissioner

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* * * *

[1729] PLAINTIFF'S EXHIBIT 67

1532 Court Place Denver, Colorado June 8, 1935

Hon E. P. Costigan Senate Chamber Washington D.C. Jun 11 1935

Dear Sir: I am a resident of Denver and one of the locators of a group of oil shale placer mining claims located in Garfield County, Colorado. Our locations were made in 1919 and have never been questioned as to bona fides of locators or as to discovery. But after doing annual assessment work from the time of location until and including the year ending July 1, 1931 our title was adversed by direction of the Department of the Interior in office letters of October 8, 1931 and Nov. 13, 1931 on the ground of failure to perform adequate assessment work. After hearings the Land Office decided our work was adequate on six claims and not sufficient on six so declared our title to the latter six null and void. These proceedings bore the number 1333556 "N" CRB and [1730] were titled United States vs Joseph Ahearn et al. This letter notifying me of the final decision, after appeal by me to the Secretary from the Land Office decision, was dated July 6, 1932 and was marked refer to A-16739.

I am not an attorney and am at somewhat of a loss as to the method of procedure by which we may have our title cleared of the cloud placed upon it by the action of the Secretary of the Interior which the Supreme Court

of the United States in a decision given out on June 3rd was declared to be beyond his authority.

Would it be possible for you to take the matter up with the Secretary's office and so have our titles cleared?

Please advise me as to what course I should pursue and I will appreciate anything you may be able to do for me. There are other cases similar to mine in that same area.

Respectfully yours

Joseph D. Ahearn
1532 Court Place
Denver, Colorado

[1731] PLAINTIFF'S EXHIBIT 68

June 24, 1935 1333556 "N" CRB Information

Hon. Edward P. Costigan, United States Senate

My dear Senator: I have received your letter of June 12, 1935, with enclosed letter to you from Mr. Joseph D. Ahearn of 1532 Court Place, Denver, Colorado, concerning his oil shale placer claims.

The records of this office show that as a result of departmental decision of June 30, 1932, the Little Jim Nos. 2, 7, 8, 9, 10 and 11, oil shale placer claims owned or claimed by Josehp D. Ahearn and others were declared to be null and void on October 17, 1932, because of the claimants' failure to perform the annual assessment work upon the claims for the year ending July 1, 1931.

On June 31, 1935, the Supreme Court in the case of Secretary of the Interior v. Virginia-Colorado Development Corporation, involving a similar question, held that [1732] the United States is without authority to declare invalid an oil shale placer claim because of the claimant's failure to perform the annual assessment work upon such claim.

In view of the decision of the Supreme Court Mr. Ahearn's letter has been treated as an informal request

for reconsideration of the Department's decision of June 30, 1962, referred to above. It has, accordingly, been filed with the case and the entire record has been transmitted to the Secretary of the Interior for his consideration.

Mr. Ahearn will be duly advised of the final action taken upon his request.

A carbon copy of this letter is enclosed herewith.

Very respectfully,

/s/ Fred W. Johnson
Commissioner

LME: 6/14

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* * * *

[1735] PLAINTIFF'S EXHIBIT 69

Department of the Interior Washington September 3, 1935 Joseph D. Ahearn et al. A. 16739.

"N" : File 1333556. : Oil shale placers held void. : Vacated. Motion for Rehearing Official Copy, not to be taken from the record.

By decision of June 30, 1932, the Department, in affirmance of a decision by the Commissioner of the General Land Office, held the Little Jim oil shale placer claims numbered 2, 7, 8, 9, and 11 for lands situate in T. 5 S., R. 95 W., and T. 6 S., R. 96 W., 6th P. M., Colorado, null and void on account of failure to perform assessment work. On October 17, 1932, the Commissioner declared Little Jim No. 10 claim null and void because it had been inadvertently omitted from the departmental decision although it had been included in the decision appealed from.

Josehp D Ahearn has filed an informal motion for rehearing.

In the case of Ickes v. Virginia-Colorado Development Corporation, decided June 3, 1935, the Supreme Court of the United States held that failure to do assessment work on mining claims gave the Government no right to de-

clare forfeiture and that the mining claimants lost no rights by such failure.

Received Sep 9 1935 C. L. O.

[1736] In view of this decision by the Supreme Court the action of the Department in declaring the claims involved forfeited was without authority of law and void. It is noted that no application for patent or other claim has been filed in the Land Department for the placers involved. This means that the matter will stand as if no adverse proceedings had been brought. If and when application for patent shall be filed for these placer claims such application will be considered on its merits. In the meantime, so far as the records of the Land Department are concerned, the lands involved appear and are regarded as vacant and unappropriated public lands.

The departmental decision of June 30, 1932, and the adverse proceedings and the Commissioner's decision are vacated.

(Sgd) Charles West,
Under Secretary.

[1737] PLAINTIFF'S EXHIBIT 70

* * * *

The Shale Oil Company Decided June 24, 1935

Mining Claim—Validity—Cancelation—Authority of Secretary of the Interior.

The Secretary of the Interior has authority to determine that a mining claim is invalid for lack of discovery, for fraud, or other defect, or that it is subject to cancelation for abandonment.

Mining Claim—Oil Shale Lands—Assessment Work—Default—Who May Challenge Folling Default.

Under section 2324 of the Revised Statutes, a default in performance of annual work on a mining claim renders it subject to relocation by another claimant, but does not affect the locator's right as between him and the United States, and he is entitled to preserve his claim by

resumption of work after default and before such relocation.

[1738] Decisions of the Department of the Interior

Mining Claim—General Leasing Act—Excepting Clause in Section 37.

The excepting clause in section 37 of the General Leasing Act, saving existing valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws," held to preclude the United States from declaring a forfeiture of a mining claim, otherwise valid, for default in performance of assessment work.

Prior Decisions and Regulations Overruled.

The decisions and regulations of the Land Department, in so far as in conflict with the decision herein, overruled.[1]

Walters, First Assistant Secretary:

* * * *

[1739] By letter of May 26, 1934, in reply to a request for oral argument in support of the appeal, the Department stated that the question whether the Department has authority to forfeit oil shale placer claims by reason of defaults in the performance of assessment work has recently been answered in the negative by the Court of Appeals of the District of Columbia in the case of Ickes v. Virginia-Colorado Development Corporation, but that a petition for certiorari had been granted by the Supreme Court, and agreed to suspend action on the appeal in the instant case pending the decision of the Supreme Court in the Virginia-Colorado Development Corporation case.

* * * *

[1740] The Supreme Court, adverting to the fact that the validity of the locations there involved was not questioned, except as to failure to perform assessment work, held that plaintiff (The Virginia-Colorado Development Corporation) lost no rights by failure to do the assessment work; that failure gave the Government no right of forfeiture; that the plaintiff came directly within the exception contained in Section 37 of the Leasing Act saving existing valid claims "thereafter maintained in

compliance with the laws under which initiated, which claims may be perfected under such laws"; that the challenge to the valid existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings, and the decision set forth in the bill, went beyond the authority conferred by law.

In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein in the instant case must be held as without authority of law and void. The above-mentioned decision of the Department in the Virginia-Colorado Development Corporation case and the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of Francis D. Weaver and Federal Oil Shale Company and other Departmental decisions in conflict with this decision are hereby overruled. The Commissioner's decision is reversed and the record in the case remanded with instructions to reinstate the application and entry in toto and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clear-list the application for patent.

Reversed and remanded.

[1741] PLAINTIFF'S EXHIBIT 71

Address only the Commissioner of the General Land Office United States Department of the Interior General Land Office Washington, Jul 6 - 1935 10

In reply please refer to 1606652 "N" CRB Oil shale records. Instructions.

Register, Salt Lake City, Utah.

Sir: Further reference is had to your letter of June 15, 1935, relative to records in contest cases involving oil shale placers, answered June 28, 1935. On June 24, 1935, the Department, in the case of the Shale Oil Company, Denver mineral entry 042552, stated that in view of the decision of the Supreme Court in the case entitled Ickes v. Virginia-Colorado Development Corporation, hold-

ing that the Department is without authority to challenge the validity of an oil shale placer on account of a failure to perform the annual assessment work, all previous departmental decisions in conflict therewith "are hereby overruled".

Said departmental decision has now been promulgated [1742] and in view thereof and of the Department's action in remanding the Shale Oil Company case with instructions to reinstate the application and entry in toto and dispose of the same unaffected by the default in the performance of annual assessment work, you are instructed to close out on your records and transmit to this office all contest cases involving solely the question of a failure to perform annual assessment work and failure to resume work on oil shale placers prior to the date of a challenge by the United States to the valid existence of the claims, where no answer has been filed by the claimants. In all cases involving only the question of annual assessment work where answer has been filed by any of the contestees, you will transmit the records to this office without action. You will retain in your files, subject to further instructions from this office, all contest cases involving oil shale placers wherein charges have been made involving other questions than that above stated, even if a charge has also been made in that regard.

In your response hereto refer to this letter by date and number.

Very respectfully,

Antoinette (name illegible)
Commissioner.

7-1 edt

[1743] PLAINTIFF'S EXHIBIT 72

Address only the Commissioner of the General Land Office 2 x 1 x S. A. C.

United States Department of the Interior General Land Office Washington 7/29/35

In reply please refer to 1290989 "N" CRB

Mountain States Mineral Land Company, et al.

Contest No. 11823 dismissed. Case closed. Instructions.

Register, Denver, Colorado.

Sir:

* * * *

[1744] On June 3, 1935, the Supreme Court decided in the case of Ickes v. Virginia-Colorado Development Corporation, that the United States has no right to declare oil shale placers null and void because of failure on the part of the claimants to perform annual assessment work thereon, and on June 24, 1935, the Department in the case of the Shale Oil Company, Denver, mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case, and overruled its previous decisions in conflict with the Supreme Court's decision.

From the foregoing it is clear that the adverse proceedings in this case are invalid for any purpose. Accordingly, contest No. 11823 is dismissed and the case is closed. Advise the parties hereof.

Several contest cases involving oil shale placers are now pending in your office. In view of the decisions referred to hereinabove, you are instructed to close out on your records and transmit to this office all contest cases involving solely the question of a failure to perform annual assessment work, and failure to resume work on oil shale placers prior to the date of a challenge by the United States to the valid existence of the claims, [1745] where no answer has been filed by the claimants. In all cases involving only the question of annual assessment work where answer has been filed by any of the contestees you will transmit the record to this office without action.

You will retain in your files, subject to further instructions from this office all contest cases involving oil shale placers wherein charges have been made involving other questions than that above stated, even if a charge has also been made in that regard.

In your response hereto refer to this letter by date and number.

Very respectfully,

Sgd Fred W Johnson
Commissioner.

LMN 7/18

[1746] PLAINTIFF'S EXHIBIT 73

4 Address only the Commissioner of the General Land Offise 11 x 1 x S. A. C.

United States Department of the Interior General Land Office Washington Jul 30 1935

In reply please refer to 1412210 "N" CRB

United States vs. F. V. Larson et al

Contest No. 6255. Register's decision reversed. Contest dismissed. Case closed.

Register, Salt Lake City, Utah.

Sir: June 30, 1931, adverse proceedings involving the validity of the Hell Hole Nos. 1 to 4, inclusive, 7 to 44, inclusive, and 49 and 50 oil shale placers, were ordered on the charge that annual assessment work to the value of $100 was not performed upon each or any one of the claims for the year ending July 1, 1930, and that work had not been resumed thereon when challenges to the validity thereof were posted thereon on behalf of the United States.

Notice issued, answer denying the charge was filed, hearing was duly held, and on July 12, 1933, you recommended that the claims be declared null and void. [1747] August 24, 1933, you transmitted the record to this office.

On June 3, 1935, the Supreme Court decided in the case of Ickes vs. Virginia-Colorado Development Corpor-

ation, that the United States has no right to declare null and void oil shale placers because of failure on the part of the claimants thereof, to perform annual assessment work thereon, and on June 24, 1935, the Department, in the case of the Shale Oil Company, Denver mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case and overruled its previous decisions in conflict with the Supreme Court's decision.

From the foregoing it is clear that the adverse proceedings in this case are invalid for any purpose, and your decision, therefore, is reversed, the contest is dismissed and the case closed. So note your records and advise the parties in interest by ordinary mail.

Very respectfully,

Fred W. Johnson
Commissioner.

LMN 7/18

[1748] PLAINTIFF'S EXHIBIT 74

Address only the Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington Jul 31 1935

In reply please refer to 1606652 "N" CRB Oil shale records. Instructions.

Register, Evanston, Wyoming.

Sir: Several contests involving the matter of a failure to perform the annual assessment work on oil shale placer mining claims or to resume work thereon before a charge to the valid existence of the claims was made by the United States are pending in your office.

On June 3, 1935, the Supreme Court in the case of Ickes, Secretary of the Interior, v. Virginia-Colorado Development Corporation, held that the United States is without authority to challenge the validity of an oil shale placer on account of failure to perform the annual assess-

ment work thereon. June 24, 1935, the Department in the case of the Shale Oil Company, Denver mineral entry 042552, stated that in view of the above decision the [1749] Department is without authority to challenge the validity of an oil shale placer on account of failure to perform annual assessment work, and over-ruled all previous Departmental decisions in conflict therewith.

In view of the said decisions, you are instructed to close out on your records and transmit to this office all contest cases involving solely the question of a failure to perform annual assessment work and failure to resume work on oil shale placers prior to the date of a challenge by the United States to the valid existence of the claims where no answer has been filed by the claimants. In all cases involving only the question of annual assessment work where answers have been filed by any of the contestees, you will transmit the records to this office without action.

You will retain in your files, subject to further instructions from this office, all contest cases involving oil shale placers wherein charges have been made involving other questions than that above stated, even if a charge has also been made in that regard.

In your response hereto, refer to this letter by date and number.

Very respectfully,

Fred W. Johnson
Commissioner.

7-27-gmr

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* * * *

[1751] PLAINTIFF'S EXHIBIT 75

July 31, 1935 1606652 "N" CRB Oil shale records. Instructions.

Register, Cheyenne, Wyoming.

Sir: Several contests involving the matter of a failure to perform the annual assessment work on oil shale

placer mining claims or to resume work thereon before a charge to the valid existence of the claims was made by the United States are pending in your office.

On June 3, 1935, the Supreme Court in the case of Ickes, Secretary of the Interior, v. Virginia-Colorado Development Corporation, held that the United States is without authority to challenge the validity of an oil shale placer on account of failure to perform the annual assessment work thereon. June 24, 1935, the Department in the case of the Shale Oil Company, Denver mineral entry 042552, stated that in view of the above decision the

* * * *

[1753] Department is without authority to challenge the validity of an oil shale placer on account of failure to perform annual assessment work, and over-ruled all previous Departmental decisions in conflict therewith.

In view of the said decisions, you are instructed to close out on your records and transmit to this office all contest cases involving solely the question of a failure to perform annual assessment work and failure to resume work on oil shale placers prior to the date of a challenge by the United States to the valid existence of the claims where no answer has been filed by the claimants. In all cases involving only the question of annual assessment work where answer has been filed by any of the contestees, you will transmit the records to this office without action.

You will retain in your files, subject to further instructions from this office, all contest cases involving oil shale placers wherein charges have been made involving other questions than that above stated, even if a charge has also been made in that regard.

In your response hereto,refer to this letter by date and number.

Very respectfully,

Fred W. Johnson
Commissioner.

7-27-gmr

[1754]

PLAINTIFF'S EXHIBIT 76

Department of the Interior Washington Jul 30 1935
Address only the Secretary of the Interior A. 17353.
United States v. Fred A. Bloss et al.

"N" 1375534. Oil placers held void. Reversed.
Appeal From The General Land Office.

O. E. Daniels, jr. and Barge Hicky, among the co-owners of the Big Springs Nos. 1 to 6, inclusive, oil shale placers, have appealed from a decision of the Commissioner of the General Land Office dated February 18, 1933, which held upon the evidence adduced in adverse proceedings that the claims were void.

The sole charge against the validity of the claims was as follows:

"That annual assessment work to the value of $100 was not performed upon each or any one of the Big Springs Nos. 1 to 6, inclusive, oil shale placers for the year ending July 1, 1931, and that work had not been resumed on said claims September 1, 1931, when challenges to the validity thereof were posted thereon in behalf of the United States."

For the reasons fully stated in departmental decision of June 24, 1935, entitled The Oil Shale Company, the challenge to the validity of the claim, the adverse proceedings, and the decision [1755] therein were without authority of law.

The Commissioner's decision is reversed and proceedings dismissed.

T. A. Walters
First Assistant Secretary.

104633

[1756]

PLAINTIFF'S EXHIBIT 77

Department of the Interior Washington Jul 30 1935

Address only The Secretary of the Interior A. 17342. 10-3 General

United States v. The U. S. Oil Shale Company. "N" 13843406. Contest No. 12009. Oil shale placers held void. Modified.

Appeal From The General Land Office.

August 16, 1930, proceedings were instituted charging that annual assessment work to the value of $100 was not performed upon each or any one of the Golden City Nos. 1 to 36, inclusive, 40 to 42, inclusive, 44 to 47, inclusive, and Sunny Brook Nos. 1 to 37, inclusive, oil shale placers for the year ending July 1, 1930, and that work had not since been resumed.

Notice thereof was served on the U. S. Oil Shale Company, the record holder of the mining title, who demurred to the charge, contending that the Department was without authority to prefer it, and filed answer admitting the charge as to the Golden City Nos. 7 to 27, 32 to 35, and 44 to 47, inclusive, but denying it as to the remaining claims. By decision of April 8, 1931, the Commissioner of the General [1757] Land Office overruled the demurrer, held void the claims last above named, and directed that the hearing proceed on the charge against the remaining claims, namely, Golden City Nos. 1 to 6, inclusive, 28 to 31, inclusive, 36, 40 to 42, inclusive, and Sunny Brook Nos. 1 to 37. The Commissioner's action was affirmed by the departmental decision of August 7, 1931. A like charge was subsequently made against certain of the last-named claims, alleging a similar default for the year ending July 1, 1931. Hearing was held March 10, 1932. Upon review of the evidence, the Commissioner, by decision of February 21, 1933, held the charge that the work had not been done for the year 1930, had been sustained as to Golden City Nos. 3 to 6, inclusive, 28 to 31, inclusive, 36, 40 to 42, inclusive, Sunny Brook Nos. 14 to 37, inclusive, and held such

claims null and void. Golden City No. 36 was held null and void for the further reason that the evidence showed it had been abandoned.

As fully set forth in the decision of the Department of June 24, 1935, in the case of The Shale Oil Company, 55 I. D. ——, the Supreme Court in Ickes v. Virginia-Colorado Development Corp., decided June 3, 1935, that the failure to do assessment work gave the Government no right to forfeit a mining claim; that charges based upon such defaults and decisions thereon were without proper legal basis. The decision of the Commissioner of April 8, 1931, declaring the Golden City Nos. 7 to 27, 32 to 35, 44 to 47, inclusive, to be nullities [1758] and his decision of February 21, 1933, declaring the Golden City Nos. 3 to 6, 28 to 31, 40 to 42, inclusive, Sunny Brook Nos. 14 to 37, to be nullities were without effect on defendant's rights, and must be reversed. Departmental decision of August 7, 1931, above mentioned, is hereby vacated. As the uncontradicted evidence shows that Golden City No 36 was abandoned by the defendant company because of a claim thereto by one Huelit, the Commissioner's decision as to that claim is affirmed.

T. A. Walters

First Assistant Secretary.

104633

[1759]

PLAINTIFF'S EXHIBIT 78

G. L. O. 1304251 "N" AKJ Denver contest August 1, 1935

United States vs K. C. Schuyler
Contest dismissed; case closed in part.
Register, Denver, Colorado

Sir: Pursuant to a field investigation and report this office, by letter "N" of March 3, 1932, ordered proceedings against certain oil shale placer mining claims located in T. 7 S., R. 97 W., 6th P. M., Coloraod, named and described as follows:

K. C. Schuyler No. 2, being the NE ¼ K. C. Schuyler No. 3, being the NW ¼ of Sec. 24 of said township, located July 26, 1917, with E. R. Ong, G. H. and P. C. Hotz, and M. H., W. F., K.A., B. M., and M. H. Callahan, named as locators; Harold Shoup No. 1, being the SE ¼, Harold Shoup No. 2 being the NE ¼, Harold Shoup No. 3, being the NW ¼ and Harold Shoup No. 4, being the SW ¼ of Sec. 23 of said township, located September 29, 1917, with W. F., H. M., K. A., M. H., and B. M. Callahan, P.C. and G. H. Hotz and named as locators.

[1760] The proceedings were based on charges preferred as follows:

1. That the K. C. Schuyler Nos. 2 and 3 claims were not located for the use and benefit of the parties whose names were used in making the locations, but for Ralph Hartzell, K. C. Schuyler, James Doyle and the Callahan Oil Shale Company, the organization of which was in contemplation at the time the locations were made.

2. That G. H. Hotz, P. C. Hotz, W. F., K. A., B. M., and H. M. Callahan were dummy locators, their names having been used by M. H. Callahan without their knowledge and consent in locating the K. C. Schuyler Nos. 2 and 3 claims for the purpose of securing to the Callahan Oil Shale Company, or other parties more land under the location than they themselves could lawfully locate thereunder.

3. That the Harold Shoup Nos. 1 to 4, inclusive, claims were not located for the benefit of the parties whose names were used in making the locations but for Karl C. Schuyler, Ralph Hartzell, James Doyle and M. H. Callahan.

4. That W. F., H. M., K. A., B. M. Callahan and P. C., G. H. Hotz and E. R. Ong were dummy locators, their names having been used by M. H. Callahan without their knowledge and consent in locating the Harold Shoup Nos. 1 to 4 claims for the purpose of securing for himself, K. C. Schuyler, Ralph Hartzell and James Doyle more land under the locations than they themselves could lawfully locate thereunder.

5. That annual assessment work to the value of $100 was not performed upon each or any one of the K. C. Schuyler Nos. 2 and 3 and Harold Shoup Nos. 1, 2, 3 and 4 oil shale placers for the year ending July 1, 1931, and that work had [1761] not been resumed on said claims October 20, 1931, when challenges to the validity thereof were posted thereon on behalf of the United States.

On August 1923, K. C. Schuyler and George A. Taff attempted to change the boundaries of said claims so as to include in each claim portions of the same land not theretofore included therein. As sought to be amended, the claims were so described by mets and bounds as to cover the following described grounds, to wit:

Schuyler No. 2, the N ½ N ½ N ½ of Sec. 23 and N ½ N ½ N ½ of Sec. 24.

Schuyler No. 3, the S ½ N ½ N ½ of Sec. 23 and S ½ N ½ N ½ Sec. 24.

Harold Shoup No. 1, the N ½ S ½ of Sec. 23.

Harold Shoup No. 2, the N ½ S ½ N ½ of Sec. 23 and N ½ S ½ N ½ of Sec. 24.

Harold Shoup No. 3, the S ½ S ½ N ½ of Sec. 23, and S ½ S ½ N ½ Sec. 24.

Harold Shoup No. 4, to cover the S ½ S ½ of Sec. 23.

You are directed to advise the claimants that, as no location of lands valuable for oil shale could be made after the date of the leasing act of February 25, 1920 (41 Stat. 437), the amendments, which seek to include land within a claim which was not embraced therein on the date of said act, are in effect new locations as to such land [1762] and to that extent they were null and void and would not be recognized by this office.

Notice of the charges, which also included the statement and declaration regarding the amendments, was issued and served and in approprite time Karl C. Schuyler, for himself and the contestees named, filed answer, in which he admitted that the boundaries of the claims had been changed so as to include new land as to each of them, but denied every other allegation contained in the charges, or that he had not the right to include in

each claim the new ground embraced therein, and applied for a hearing.

Pursuant to notice and stipulation, evidence limited to charge 5 was taken September 10 to 15, 1932, before a notary public at Glenwood Springs, while at the final hearing before you at Denver, evidence dealing with the alleged invalidity of the locations under charges 1 to 4 was introduced the same being carbon copies of the evidence previously introduced in the case of the United States vs. Karl C. Schuyler et al, under contest No. 11667, serial 035333, involving the Annex and Black Bess oil shale placers upon similar charges.

[1763] The record together with briefs and argument by counsel for contestee was transmitted by you under date of January 25, 1934, without decision or recommendation.

The charges involving the Annex and Black Bess claims, in contest 11667, were, as above stated, similar to charges 1 to 4, inclusive, in the present case. The locators of those claims, namely, W. F. Callahan, H. M. Callahan, B. M. Callahan, K. C. Callahan, M. H. Callahan, P. C. Hotz, G. H. Hotz, and E. R. Ong are the same persons, the record shows named as locators of the K. C. Schuyler Nos. 2 and 3 and Harold Shoup Nos. 1, 2, 3 and 4 claims herein described.

The burden was upon the Government to prove, as the charges allege, that the locators were not locators in good faith, in that their names were used without their knowledge and consent by M. H. Callahan for the purpose of securing the land for the use and benefit of the Callahan Oil Shale Company, Ralph Hartzell, K. C. Schuyler and James Doyle. Finding the evidence to be insufficient to sustain the charges involving the Annex and Black Bess claims that contest was, by office letter "N" of February 6, 1935, finally dismissed and the case closed. Likewise [1764] the evidence, after a careful review of the same in connection with this case, has been found to be insufficient to sustain the allegations contained in charges 1, 2, 3 and 4 in this case also.

To the extent of these charges, therefore, the contest is hereby dismissed, subject to the right of appeal by

the Special Agent in Charge to the Secretary of the Interior within 30 days from notice hereof.

As to charge 5, which alleges failure of the claimants to perform upon each or any of the claims involved annual assessment work of the value of $100 for the year ending July 1, 1931, the Supreme Court of the United States on June 3, 1935, held in the case of Ickes, Secretary of the Interior, vs. Virginia-Colorado Development Corporation, that the oil shale claimant lost no rights by failure to do assessment work on its claims; that such failure gave no right to declare the claims null and void; and that the proceedings brought by the Government against the claims, based solely on that ground, went beyond the authority conferred by law and did not affect the validity of the claims.

[1765] As charge 5 had no foundation in law therefore, no consideration of the evidence introduced concerning it is necessary, and to that extent the proceedings are hereby dismissed and the case closed.

As to the question of annulment of the amended locations, since no application for patent has been filed no consideration of the matter in that respect is deemed necessary at this time the decision being confined to the issues raised by the charges only.

Notify the special agent in charge, also the contestees or their attorney of record, hereof, and in due time report.

Very respectfully,

/s/ Fred W. Johnson
Commissioner

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[1774]

PLAINTIFF'S EXHIBIT 79

August 19, 1935 1406966 "N" CRB Contest No. 5991 dismissed. Case closed.

Register, Salt Lake City, Utah.

Sir: Adverse proceedings against the Lyons No. 2 oil shale placer, S½ NE¼ Sec. 24, T. 10 S., R. 6 E, S.L.M., were directed by office letter of May 8, 1931. Title to the claim appears in E. L. Soules, R. M. Teachout and L. J. Lyons.

Subsequently, certain proceedings were had resulting in a hearing on April 18, 1934, at which the attorney for Teachout appeared and stated that his client consents to the cancellation of the location and the closing of the case, May 24, 1934, you transmitted the record to this office where it was suspended pending final decision in the case of Ickes vs. Virginia-Colorado Development Corporation, which was then before the Courts.

On June 3, 1935, the Supreme Court held in the case last referred to that an oil shale placer claimant [1775] lost no rights by failure to do the annual assessment work on his claims, that his failure gave the Government no right to declare the claims null and void, and that the proceedings brought by the Government against the claims on the sole ground of failure to perform such work went beyond the authority conferred by law and did not affect the validity of the claims. On June 24, 1935, the Department, in the case of the Shale Oil Company, Denver mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case, and overruled its previous decisions in conflict with the decision of the Supreme Court.

The only charge involved in Contest No. 5591 relates to a failure of the claimants to perform the annual assessment work. In view of the decisions referred to above it appears that the action previously taken by this office in the said contest was without authority of law and the contest is accordingly dismissed and the case is

closed. Advise the parties in interest who have been served with notice of the charge hereof by ordinary mail.

Very respectfully,

/s/ Fred W. Johnson
Commissioner

LMN 8/16

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* * * *

[1778]

PLAINTIFF'S EXHIBIT 80

August 19, 1935 1337598 "N" CRB Oil Shale contest dismissed. Case closed.

Register, Denver, Colorado

Sir: May 14, 1929, adverse proceedings were directed against the validity of the Hydrocarbon No. 73 oil shale placer, title to which appears in the Shale Oil Company, Grand Junction, Colorado, on the charge that annual assessment work to the value of $100 was not performed upon the claim for the year ending July 1, 1929, and that work has not been since resumed.

November 8, 1932, you reported that notices were duly issued and served and that answer had been filed. The case has been suspended in this office pending a determination by the courts of the question of the right of the United States to proceed against oil shale claimants on the ground stated in the charge outlined above.

[1779] On June 3, 1935, the Supreme Court of the United States held that the United States did not have the right to question of validity of an oil shale placer on the ground stated, and on June 24, 1935, the Department, pursuant to the mandate of the Supreme Court recalled and vacated its decision in the case of Ickes vs. Virginia-Colorado Development Corporation, and upon the basis of the Supreme Court's decision the Department overruled its previous decisions in conflict therewith.

In view of the decisions referred to above it is clear that the action previously taken by this office in initiat-

ing the said contest was without authority of law and the contest is accordingly dismissed and the case in closed. Advise the parties hereof by ordinary mail.

Very respectfully,

/s/ Fred W. Johnson
Commissioner.

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* * * *

[1792] PLAINTIFF'S EXHIBIT 82

In reply refer to [illegible] - "N" Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington

Mar 30 1940 Oil shale records. Instructions. File copy

Surname
Wilkins
Cummiford
Bradshaw
Cunningham
(illegible)
Wolfsohn

Memorandum for the Register, Denver, Colorado.

Several contests involving the matter of a failure to perform the annual assessment work on oil shale placer mining claims or to resume work thereon before a charge to the valid existence of the claims was made by the United States, are pending in your office.

In view of the rulings made in the case of Ickes, Secretary of the Interior vs. Virginia-Colorado Development Corporation, decided June 3, 1935, and in the case of Shale Oil Company, mineral entry Denver 042552, decided June 24, 1935, the previous decisions of the Department declaring oil shale placer mining claims forfeited because of the failure of the claimants to perform

the annual assessment work or to resume work before a charge to the valid existence of the claims was made, were held to be without force and effect. In view thereof, you are instructed to close on your records all contest cases involving solely the question of a failure to perform annual assessment work and failure to resume work on oil shale placers prior to the date of a challenge by the United States to the valid existence of the claim. A list of these cases should be transmitted to this office.

Also furnish this office with a list of all other oil shale contests wherein charges were made involving other questions than that above stated, even if a charge was also made in that regard.

In response hereto, refer to this memorandum by date and number.

Fred W. Johnson
Commissioner.

3-27-imc Copy for General Land Office files

[1793] PLAINTIFF'S EXHIBIT 83

1606652 "N"

United States Department of the Interior General Land Office District Land Office 342 Postoffice Bldg., Denver, Colorado April 26, 1940

The Commissioner, General Land Office, Washington, D.C. : Report Oil Shale Records

My dear Mr. Commissioner: Referring to your letter "N" of March 30, 1940, directing this office to close all contest cases against oil shale placers involving solely the question of a failure to perform annual assessment work and failure to resume work on oil shale placers, in view of the rulings made in the case of Ickes, Secretary of the Interior vs. Virginia-Colorado Development Corporation, decided June 3, 1935, in the case of Shale Oil Company, Denver 042552, you are advised that this office dismissed and closed all such cases that were in the office, following

instructions given in your letter 1290989 "N" of July 29, 1935. A list of all cases closed pursuant to your letter of July 29,1935, on that charge, is herewith attached.

I also transmit a list of cases remaining in this office, containing that charge in some cases, but all cases containing other charges. Service of notice has never been obtained on all Contestees in these cases, because it has not been possible to obtain addresses.

Very truly yours,

Jessie M Gardner.
Register

fr. (Received stamp)

* * * *

[1810] PLAINTIFF'S EXHIBIT 84

In reply refer to 1606652 "N" Address only the Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington

Oil shale contest. Mar 6 - 1941

File copy
Surname
Wilkinson
(illegible)
Altizer

Memorandum for the Register, Denver, Colorado.

Reference is made to your letter of April 26, 1940, and the list of oil shale cases attached thereto which shows the miscellaneous and contest numbers, names of the contestees and of the claims involving charges other than that of the failure of the claimants to perform the annual assessment work or to resume work before a challenge to the validity of the claims was posted thereon.

In view of the ruling made in the case of Ickes, Secretary of the Interior, vs. Virginia-Colorado Development

Corporation, decided June 3, 1935, the adverse proceedings against the oil shale claims contained in the list are hereby dismissed as to the charge relating to assessment work and the cases are closed to that extent.

You will issue notices of the other charges to the parties not already served with notice and submit reports thereof in the usual manner.

Fred. W. Johnson
Commissioner

:c: D.I. (3) 3-4jph Official copy Copy for General Land Office files

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* * * *

[1811] PLAINTIFF'S EXHIBIT 85

In reply refer to 1606652 "N" Address only to the Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington

Aug 9 - 1940 Oil shale records. Instructions. File copy
Surname
(illegible)
Altizer

Memorandum for the Register, Salt Lake City, Utah:

Several contests involving the matter of a failure to perform the annual assessment work on oil shale placer mining claims or to resume work thereon before a charge to the valid existence of the claims was made by the United States, are pending in your office.

In view of the rulings made in the case of Ickes, Secretary of the Interior vs. Virginia-Colorado Development Corporation, decided June 3, 1935, and in the case of Shale Oil Company, mineral entry Denver 042552, decided June 24, 1935, the previous decisions of the Department declaring oil shale placer mining claims forfeited because of the failure of the claimants to perform the

annual assessment work or to resume work before a charge to the valid existence of the claims was made, were held to be without force and effect. All contest cases involving this charge alone have been dismissed and closed.

You are instructed to furnish this office with a list of all oil shale contests pending in your office wherein charges were made involving the question above stated in conjunction with other charges.

In response hereto, refer to this memorandum by date and number.

Fred W. Johnson
Commissioner

(Illegible) Official copy Copy for General Land Office files

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[1813] PLAINTIFF'S EXHIBIT 87

In reply refer to 1606652 "N" Address only the Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington

Aug 9 - 1940 Oil shale records. Instructions. File copy
Surname
Bradshaw
Altizer

Memorandum for the Register, Cheyenne, Wyoming.

Several contests involving the matter of a failure to perform the annual assessment work on oil shale placer mining claims or to resume work thereon before a charge to the valid existence of the claims was made by the United States, are pending in your office.

In view of the rulings made in the case of Ickes, Secretary of the Interior vs. Virginia-Colorado Development Corporation, decided June 3, 1935, and in the case of

Shale Oil Company, mineral entry Denver 042552, decided June 24, 1935, the previous decisions of the Department declaring oil shale placer mining claims forfeited because of the failure of the claimants to perform the annual assessment work or to resume work before a charge to the valid existence of the claims was made, were held to be without force and effect. All contest cases involving this charge alone have been dismissed and closed.

You are instructed to furnish this office with a list of all oil shale contests pending in your office wherein charges were made involving the question above stated in conjunction with other charges.

In response hereto, refer to this memorandum by date and number.

Fred W. Johnson
Commissioner

(illegible) Official copy Copy for General Land Office files.

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[1815] PLAINTIFF'S EXHIBIT 89

In reply refer to 1606652 "N" Address only the Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington

Aug 9 - 1940 Oil shale records. Instructions. File copy
Surname
Bradshaw
Altizer

Memorandum for the Register, Evanston, Wyoming:

Several contests involving the matter of a failure to perform the annual assessment work on oil shale placer mining claims or to resume work thereon before a charge

to the valid existence of the claims was made by the United States, are pending in your office.

In view of the rulings made in the case of Ickes, Secretary of the Interior vs. Virginia-Colorado Development Corporation, decided June 3, 1935, and in the case of Shale Oil Company, mineral entry Denver 042552, decided June 24, 1935, the previous decisions of the Department declaring oil shale placer mining claims forfeited because of the failure of the claimants to perform the annual assessment work or to resume work before a charge to the valid existence of the claims was made, were held to be without force and effect. All contest cases involving this charge alone have been dismissed and closed.

You are instructed to furnish this office with a list of all oil shale contests pending in your office wherein charges were made involving the question above stated in conjunction with other charges.

In response hereto, refer to this memorandum by date and number.

Fred W. Johnson
Commissioner.

(Illegible) Official copy Copy for General Land Office files

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[1817] PLAINTIFF'S EXHIBIT 91

United States Department of the Interior General Land Office Branch of Field Examination 355 Post Office Building Salt Lake City, Utah June 5, 1942

Refer to File: 1606652 B.F.E. Oil Shale Cases, Colorado

[Handwritten notation] Reports rel to pending

: Advising of status of oil : shale cases in Colorado.

Memorandum for the Supervisor, Branch of Field Examination, General Land Office:

* * * *

When I took charge of this Region in January, 1935, there were 4203 pending oil shale cases. In practically all of these cases adverse proceedings had been directed on the ground that the required assessment work had not been done on the claims,

* * * *

[1818] As a result of various conferences held between myself and the Director of Investigations, and as a result of some correspondence, I was finally authorized by the then Director of Investigations on August 21, 1935, to close all of those cases in which adverse proceedings had been directed on the ground that the assessment work had not been performed, and to keep open only those cases in which adverse proceedings had been directed on the ground of non-discovery. The cases were examined in detail, and as a result, all except 67 were closed during the months of January and February, 1936. It required considerable time to examine all of the cases and prepare appropriate lists.

* * * *

[1820] N. F. Waddell
Regional Field Examiner

NFW:DB

[1821] PLAINTIFF'S EXHIBIT 91-A

1606652 General Land Office Office communication July 29, 1942

Memorandum for Mr. Wolfsohn.

* * * *

Following this decision the Department in its instructions of June 17, 1930, modified the prior instructions of February 28, 1930, and directed that challenges made to the validity of an oil shale claim for failure to do the annual assessment work must be initiated prior to the

commencement of patent proceedings, including the commencement of publication of notice. Following these instructions every oil shale claim of record during the years 1930 to 1933 was examined and a notice posted on each claim, where the field examination justified such action, stating that possession of the claim had been taken in the name of the United States. The Government expended thousands of dollars in its attempt to clear the records of these supposedly invalid oil shale claims only to be overruled by the United States Supreme Court in the case of Virginia-Colorado Development [1822] Company (295 U.S. 639). Briefly, the Supreme Court held in this latter case that a mining claimant lost no rights by failure to do the assessment work; that failure gave the Government no right of forfeiture, and that the holder of such mining claim came directly within the exception contained in section 37 of the leasing act of 1920 saving existing valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws"; that the challenge to the valid existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. Following this decision the Department in the case of Shale Oil Company decided June 24, 1935 (55 I.D. 287), revoked its instructions of June 17, 1930 (53 I.D. 131). This briefly resulted in the cessation of any activities on the part of this office in clearing the oil shale claims, since no new oil shale placer claims can be initiated since the 1920 leasing act, and the Government cannot defeat the claims or take possession because of failure of the claimant to perform annual assessment work. The only action we can take is to challenge the claim on the general ground of no discovery or abandonment. This already has been done in the few cases where the facts warranted the preferring of such charges.

* * * *

Under the circumstances, therefore, about all we can do is to wait until the Gulf Oil Corporation or any other oil shale placer claimants present applications for patent

and then see that the showing made in each case justifies a patent. The Grazing Service has been eager for years to clear the records of this oil shale as the lands are within grazing districts.

• • • •

Howell
Supervisor of the Branch
of Adjudication

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[1827] PLAINTIFF'S EXHIBIT 95

Oil Shale Claims Patented on Applications Filed Subsequent to the Virginia-Colorado Decision, June 3, 1935

[1828]

Names and numbers of Claims	Contest Number	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
Coral T. 1, 2, 8, 9	12610				
Coral T. 26, 28-30	13028	1128255	2/ 9/50	8(of 10)	1,277.45
Clear Creek	12906	1129498	7/24/50	1	118.47
Lucky Strike 15	13030	1130493	12/ 4/50	1	29.30
Coral T. 39, 40	12420	1130494	12/ 4/50	2	315.78
Last Chance 1-3	13001	1130593	12/18/50	3(of 6)	480.00
Triumph 21-28	12021	1130594	12/18/50	8	1,271.84
A.D.1; J.D.5	12179				
A.D. 2-4; F.D. 3-8; P.D. 1-8; J.D. 1-4, 6-8	12022	1130595	12/18/50	26	4,162.40
Westfield 1, 2	12257	1131332	3/ 6/51	2	80.00
Grand Valley 7, 8	11956				
Gem 1-10		1131391	3/19/51	18	2,080.10
Community 1	12013				

Names and numbers of Claims	Contest Number	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
Lucky Strike 1, 20	13029	1131392	3/19/51	2(of 8)	246.92
Lucky Strike 23	12844	1131394	3/19/51	1	51.00
Velvet 13, 14	12300	1131843	5/ 1/51	2	74.33
Coral T. 3, 4, 7	13029	1132289	6/14/51	3	157.27
Echo 1, 2, 4,	12725				
Echo 3, 6	12919	1136446	9/16/52	11	1,450.64
Texas 30, 41, 46-49	12922				
[1829]					
F. and C. 1, 2	12971	1139057	5/ 5/53	2	224.75
Midas 8	12154				
Midas 3					
Double B 1, 3	12992				
Bituminite 1	12993	1139294	5/28/53	8(of 9)	936.17
Midas 4	12171				
Bituminite 2	12155				
Pratt 11, 12	12271	1141193	10/ 7/53	2	320.00
Pratt 1, 2, 5, 6	12271	1141578	11/18/53	4	640.00
Clear Creek 2, 4	12275				
Velvet Shale 20	12888	1142205	12/29/53	3	70.43
Adelaide 1-4	11859	1142214	12/30/53	4	583.77
Massive 1-4, 6, 7					
Shale King					
Shale King 1-9					
Debeque					
Debeque 1, 3, 4	12032	1143461	3/23/54	29	4,400.80
Shale Mountain Fraction					
Shale Ranch					
Shale Mountain					
Shale Mountain 1-5, 8					
Davy 1	11855	1143855	4/ 7/54	1	80.84
Davy 3	11855	1143856	4/ 7/54	1	40.00
Boulder 1, 5	12927	1144370	5/ 7/54	2(of 5)	316.76

[1830]

Names and numbers of Claims	Contest Number	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
G.M. 1-3, 5-16, 21-24 26-30	12198				
G.M. 4	12262	1145915	8/ 5/54	33	4,683.29
G.M. 19, 20, 25, 31-35	12573				
Roosevelt 1-4, 6	12367				
Becky 5, 6	11864	1146469	9/ 3/54	7	915.12
Victor 7, 8	12621				
Victor 3; Woody 3, 4	12371	1146470	9/ 3/54	5	310.00
Grand 3, 4, 7	12367	1146471	9/ 3/54	3	57.50
Little Pete	11861	1146472	9/ 3/54	1	120.00
Ransom 5, 6	12725	1150854	3/17/55	2	319.74
Big Pete 3, 5-7	11855				
Big Pete 4		1151423	4/ 7/55	9	1,400.00
Adelaide 5-8	12354				
Buffalo 1, 2	11855	1151424	4/ 7/55	2	320.00
Lucile 1-7	11855	1151425	4/ 7/55	7	1,120.00
Martin 1	12854	1151426	4/ 7/55	1	160.00
Dere 5-8	11855	1151427	4/ 7/55	4	600.00
Colorado 1-6 (Colorado Group (2 claims))	11855	1151428	4/ 7/55	6	960.00
Dere 2-4	11855	1151429	4/ 7/55	3	360.00

[1831]

Denver 1-8	12069	1151430	4/ 7/55	8	1,202.36
Coscoro 1-4	11746				
Coscoro 5-9, 11	11748				
Ureca 1-16	11745				
War Eagle 5-9	11748				
Marcedus 1-14	11752	1151544	4/13/55	88	13,938.68
Black Eagle 1-6	11755				
Aspin 1-3	11756				
War Eagle 1, 2	11748				
C.F 4 O.S.Co. 1-18, 20, 21, 23-27, 30-36	11749				

Names and numbers of Claims	Contest Number	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
Black Sulphur Falls 1-17	11753				
Ute 1-12	11754	1151868	4/26/55	29	4,640.00
Buffalo 3, 4	11855	1151870	4/26/55	2	323.79
Dry Land 1, 2	12152	1151915	4/27/55	2	191.60
South Star 1-4 Snow Crest 1-4 North Star 5	12025	1152194	5/10/55	9	1,440.00
Pratt 3, 4, 9, 10	12271	1152512	6/ 7/55	4	640.00
Denver 111, 112	11862	1156994	2/ 2/56	2	320.00
Columbine 1-8	11855	1157155	2/ 9/56	8	1,280.00
Champion 5	12626	1160705	6/19/56	1	36.04
Joe T. 1	13066				
Woodrow Wilson 12	12105	1174074	8/13/57	2	320.00
[1832]					
Roosevelt 8, 11	12367	1174144	8/14/57	2	244.34
January 4 New Year Error	12046	1174146	8/14/57	3	360.00
New Year 3	12046A	1175032	9/13/57	1	80.00
Aspin 5, 6	11756	1175468	10/ 2/57	2	320.82
Yankee 6; Grand 12	12361	1176290	11/ 7/57	2	162.57
Coscoro 10, 12	11748				
Two Gems 1, 2	11744	1176336	11/ 8/57	6	960.00
War Eagle 3, 4	11743				
Virginia 1-5	12370	1176915	11/27/57	5	800.00
Massive	12032	1184014	7/ 1/58	1	160.00
Colorado Figure Four Oil Shale Co. 19, 22, 28, 29	11749	1190477	1/ 9/59	4	640.00
T.N.T. 1	12038	1191551	1/26/59	1	78.37

Names and numbers of Claims	Contest Number	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
Lucky Strike Red Top Evergreen Black Eagle Winner Blue Bird Big Chief	12024A	1192386	2/10/59	7 (of 9)	1,121.04
[1833]					
Sulphur Springs	12780				
Mount Blaine	12132				
Mary L.	12670				
Mt. Blaine 1, 3	12798	1196641	6/19/59	10 (of 17)	1,340.82
Mount Blaine	13096				
Mount Blaine 1, 4 John A. Herman F. Mary L. Gertrude L. Alva A.					
West Star 1-4 North Star 1-4, 6	12025	1204188	1/26/60	9	1,070.16
G.M. 17, 18	12261	1205139	2/17/60	2	320.00
Bitumen 24	13071	1210613	7/ 6/60	1 (of 14)	50.00
			Totals	507	74,578.06

[1834] II. Oil Shale Claims in Colorado Patented on Applications filed Subsequent to the Virginia-Colorado decision, June 3, 1935

Name of Claim	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
Golden City 1, 2 Sunny Brook 7, 10, 12	1110478	2/18/41	5	605.23
Golden City 5, 6, 28	1113261	3/ 3/42	3	400.00
Sunny Brook 1-3	1113262	3/ 3/42	3	459.92
Mt. Mamm 12-15	1119490	2/19/45	4	488.61
Golden City 3, 4, 29-31	1122907	10/27/47	5	698.58
Buck Canyon 3, 4, 9, 10	1124594	2/ 3/49	4	640.00
Blue Bird 3	1126338	6/17/49	1	120.00
Big Bell 1, 3, 5-8	1126450	6/29/49	6	960.00

Name of Claim	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
Triumph 1-12, 15, 16	1126492	6/30/49	14	2,240.00
J.B. 1-4	1127287	9/21/49	4	635.16
Chicago 1-4 Smuggler 1-4	1127293	9/22/49	8	1,278.40
Clear Creek 1-3, 5-8	1127499	10/19/49	7	1,118.40
Triumph 29-44	1128041	1/26/50	16	2,560.00
F.D. 1, 2 C.D. 1-8 C.C.D. 1-8	1128042	1/26/50	18	2,886.00
Coral T. 1, 2, 8, 9, 26-30, 38	1128255	2/ 9/50	10	1,594.04
Sunny Brook 15-37	1128451	3/ 8/50	23	3,681.43
[1835]				
Clear Creek Clear Creek 1	1129498	7/24/50	2	118.47
Coral T. 31-37	1129799	8/29/50	7	1,116.49
Golden City 40-42	1129902	9/ 7/50	3	316.68
Sunny Brook 4-6, 8, 9, 11, 13, 14	1129903	9/ 7/50	8	1,214.33
Lucky Strike 15	1130493	12/ 4/50	1	29.30
Coral T. 39, 40	1130494	12/ 4/50	2	315.78
Last Chance 1-6	1130593	12/18/50	6	960.00
Triumph 21-28	1130594	12/18/50	8	1,271.84
J.D. 1-8 A.D. 1-4 P.D. 1-8 F.D. 3-8	1130595	12/18/50	26	4,162.40
Westfield 1, 2	1131332	3/ 6/51	2	80.00
Gem 1-10 Community 1 Grand Valley 7, 8	1131391	3/19/51	13	2,080.10
Lucky Strike 1-3, 19, 20, 24-26	1131392	3/19/51	8	1,207.22
Lucky Strike 23	1131394	3/19/51	1	51.00
Velvet 13, 14	1131843	5/ 1/51	2	74.33
Coral T. 3, 4, 7	1132289	6/14/51	3	157.27

Name of Claim	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
[1836]				
French 1-11, 26-31	1132814	8/20/51	17	2,394.51
Sookum 1	1136026	7/31/52	1	161.15
Echo 1-4, 6 Texas 30, 41, 46-49	1136446	9/16/52	11	1,450.64
F. and C. 1, 2	1139057	5/ 5/53	2	224.75
D. & R. G. 1-3	1139281	5/27/53	3	443.36
Midas 3, 4, 7, 8 Double B 1, 3 Bituminite 1-3	1139294	5/28/53	9	1,243.35
Falls 1-3	1139295	5/28/53	3	359.20
Pratt 11, 12	1141193	10/ 7/53	2	320.00
Pratt 1, 2, 5, 6	1141578	11/18/53	4	640.00
Clear Creek 2, 4 Velvet Shale 20	1142205	12/29/53	3	70.43
Adelaide 1-4	1142214	12/30/53	4	583.77
Bituminite 4 J.B. 7, 8	1142448	1/20/54	3	467.87
Massive 1-4, 6, 7 Shale King Shale King 1-9 Debeque Debeque 1, 3, 4 Shale Mountain Fraction Shale Ranch Shale Mountain Shale Mountain 1-5, 8	1143461	3/23/54	29	4,400.80
[1837]				
Davy 1	1143855	4/ 7/54	1	80.84
Davy 3	1143856	4/ 7/54	1	40.00
Boulder 1-3, 5, 6	1144370	5/ 7/54	5	798.78
G.M. 1-16, 19-35	1145945	8/ 5/54	33	4,683.29
Roosevelt 1-4, 6 Becky 5, 6	1146469	9/ 3/54	7	915.12
Victor 3, 7, 8 Woody 3, 4	1146470	9/ 3/54	5	310.00
Grand 3, 4, 7	1146471	9/ 3/54	3	57.50
Little Pete	1146472	9/ 3/54	1	120.00
Ransom 5, 6	1150854	3/17/55	2	319.74
Little Jim 1-3, 5-12	1151207	3/30/55	11	1,762.93
Adelaide 5-8 Big Pete 3-7	1151423	4/ 7/55	9	1,400.00

Name of Claim	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
Buffalo 1, 2	1151424	4/ 7/55	2	320.00
Lucile 1-7	1152425	4/ 7/55	7	1,120.00
Martin 1	1151426	4/ 7/55	1	160.00
Dere 5-8	1151427	4/ 7/55	4	600.00
Colorado 1-6	1151428	4/ 7/55	6	960.00
Dere 2-4	1151429	4/ 7/55	3	360.00
Denver 1-8	1151430	4/ 7/55	8	1,202.36
[1838]				
Marcedus 1-14 Ureca 1-16 Colorado Figure Four Oil Shale Co. 1-18, 20, 21, 23-27, 30-36 Black Eagle 1-6 Aspin 1-3 Coscoro 1-9, 11 War Eagle 1, 2, 5-9	1151544	4/13/55	88	13,938.68
Ute 1-12 Black Sulphur Falls 1-17	1151868	4/26/55	29	4,640.00
Buffalo 3, 4	1151870	4/26/55	2	323.79
Perfection 1-4, 9-12 Magnetic No. 1	1151914	4/24/55	9	1,360.80
Dry Land 1, 2	1151915	4/27/55	2	191.60
South Star 1-4 Snow Crest 1-4 North Star 5	1152194	5/10/55	9	1,440.00
Pratt 3, 4, 9, 10	1152512	6/ 7/55	4	640.00
Gold Oil 54	1156704	1/18/56	1	39.97
Denver 111, 112	1156994	2/ 2/56	2	320.00
Columbine 1-8	1157155	2/ 9/56	8	1,280.00
Champion 5	1160705	6/19/56	1	36.04
Gordon V.	1160966	6/25/56	1	80.01
Hydrocarbon 39-43, 46-48	1162967	8/ 8/56	8	1,291.41
Bernard R.	1164738	9/12/56	1	157.60

[1839]

Name of Claim	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
Pilot	1165239	10/ 4/56	1	161.20
Hydrocarbon 57-60, 61A, 62, 64, 66-72, 92, 93, 121	1166325	11/ 9/56	17	2,443.41
G.J. 1-24	1168686	2/ 8/57	24	3,771.69
Joe T. 1 Woodrow Wilson 12	1174074	8/13/57	2	320.00
Roosevelt 8, 11	1174144	8/14/57	2	244.34
Denver 77, 78	1174145	8/14/57	2	219.44
January 4 New Year 4 Error	1174146	8/14/57	3	360.00
Madden 1, 2	1175031	9/13/57	2	320.26
New Year 3	1175032	9/13/57	1	80.00
Grand Valley 1, 2	1175467	10/ 2/57	2	75.42
Aspin 5, 6	1175468	10/ 2/57	2	320.82
Yankee 6 Grand 12	1176290	11/ 7/57	2	162.57
Coscoro 10, 12 Two Gems 1, 2 War Eagle 3, 4	1176336	11/ 8/57	6	960.00
Virginia 1-5	1176915	11/27/57	5	800.00
Pratt 7, 8	1180216	3/13/58	2	320.00

[1840]

Idell 17, 18	1183631	6/26/58	2	192.56
Idell, 1, 2, 7, 20-24	1183632	6/26/58	8	1,178.73
Massive	1184014	7/ 1/58	1	160.00
Colorado Figure Four Oil Shale Co. 19, 22, 28, 29	1190477	1/ 9/59	4	640.00
T.N.T. 1	1191551	1/26/59	1	78.37
Lucky Strike Red Top Evergreen Carlyle Hardison Black Eagle Winner Blue Bird Big Chief	1192386	2/10/59	9	1,384.14

Name of Claim	Patent Number	Date of Patenting	Number of Claims	Acreage of Claims
Big Pete 8, 9	1192960	2/19/59	2	280.00
May Belle 1-4, 7 Ammonia Phenol Coal Tar Potash Tungsten Alum	1195836	5/26/59	11	1,709.88
[1841]				
Charles E. Charles E. (2nd) Alva A. Herman F. Gertrude L. John A. Mary L. Grace L. James H. James H. (2nd) Sulphur Spring Mount Blaine Mount Blaine 1, 3-5 Petroleum	1196641	6/19/59	17	2,359.57
Idell 3-6	1198022	8/ 6/59	4	640.00
West Star 1-4 North Star 1-4, 6	1204188	1/26/60	9	1,070.16
G.M. 17, 18	1205139	2/17/60	2	320.00
General Haig 10, 11	1210612	7/ 6/60	2	307.45
Good Hope 47-52, 62-65, 69 Coral T. 71 Bitumen 24 General Pershing 12	1210613	7/ 6/60	14	1,812.69
Good Hope 1-16, 61, 79-82	1210614	7/ 6/60	21	3,325.70
		Totals	768	113,249.67

* * * *

Clerk's Note: Plaintiff's Exhibits No. 102 - Photocopy of a Page 91 Description of tract; No. 103 - Photocopy of a Page 96 Description of tract; No. 104 - Final Cert. of Mineral Entry 2/25/49 - appear in separate exhibit book.

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[1874]

PLAINTIFF'S EXHIBIT 114

Located 4-1-'18 Feb. 27, 1950.

Oil shale mineral entries Denver 056601 and 056606.

Triump Nos. 22 & 23 = M. E. 056601

F. D. No. 7; J. D. Nos. 1, 2, 3, 5 = M. E. 056606

May 23, 1916:	Lands classified as mineral land valuable as source of petroleum and nitrogen.
Feb. 2, 1918:	Commissioner's order that mineral reservations under the act of July 17, 1914 for lands classified as mineral lands valuable as a source of petroleum and nitrogen should read:
	Excepting and reserving, however, to the United States all oil and gas and oil shale or other rock valuable as a source of petroleum and nitrogen in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the act of July 17, 1914 (38 Stat.509).
locations made 4-5-18	
May 10, 1920:	H.E. appln 018825 (now Den.032576) filed, subject to above reservation and addl S.R.HE appln 018827 under stockraising act. E

May 17, 1920	and Jan. 28, 1921, entries allowed, respectively.
May 22, 1923:	Final proof on both entries submitted. Protest against the enlarged entry filed by Standard Shales, claiming superior rights under Triumph Nos. 22 and 23 oil shale placer claims located April 5, 1918; protest by J.D. Freeman, based on F.D.No. 7 and J.D. Nos. 1, 2 and 3 and 5 oil shale claims located April 1, 1918.
September 30, 1927: (52 L.D. 201	Oil shale claims held based on valid discoveries and, if otherwise regular, entitled to patent, and entries 018825 and 018827 held for cancellation entries canceled.
October 14, 1927: ? :	Adverse proceedings against the oil shale claims on charge that assessment work for 1929 had not been done.
4-15-30:	Oil shale withdrawals, E. O. M. dated (balance illegible)
June 4, 1930, and July 31, 1931:	Oil shale claims declared null and void.
June 3, 1931:	appln to reinstate the homestead applns filed but rejected.
Oct. 14, 1931:	Dept held applns to reinstate could be accepted pending outcome of contests against oil shale claims. This applied to various similar cases.
November 20, 1931:	Entries 018825 and 018827 reinstated, and later patented, subject to above quoted reservation as to 018825. Entry 018827 under stockraising act. 018825 (Den. 032576) Pat'd 5-10-32 Pat. 1055090

June 30, 1935: The Dept. (55 I.D.287, 290) in view of U.S. Supreme Court decision (295 U.S.639) overruled Departmental decisions in conflict with the U.S. Supreme Court decision which held that contests could not be based on failure to do assessment work.

[1875]

PLAINTIFF'S EXHIBIT 115

United States Department Of The Interior Bureau Of Land Management Washington 25, D.C. (Seal)

Wilkins. In Reply Refer To: Duckworth "AD:RLW" Denver 056601 056606 SL-22010 22024 Mar 7-1950

Decision

Federal Oil Shale Company : Mineral - oil shale

Mineral Entries Held for Cancellation in Part Homestead Patents

Reference is made to mineral applications Denver 056601-6 filed by Federal Oil Shale Company August 30, 1948, for patent to certain oil shale placer claims in T. 5 S., R. 97 W., 6th P.M., Colorado

* * * *

A review of the two mineral applications discloses that the applications for patents and the application notices contain a provision excluding and excepting that portion of the surface of the oil shale placer mining claims which are embraced in the above conflicting patented homestead entries.

* * * * *

[1876] The mineral entries 056601 and 056606 are held for cancellation to the extent of the conflict with patented

homestead entry 032576, cancellation to be final after 30 days from receipt of notice by the entryman.

The right of appeal is allowed.

Marion Clower
Director

RLWilkinson:jah 3/3/50

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* * * *

[1878]

PLAINTIFF'S EXHIBIT 117

United States Department Of The Interior Bureau Of Land Management Washington 25, D. C. (Seal)

File Copy
Surname

Denver 056601
056606
SL 22010
22024

AD:RLW

Nov 7-1950 Confidential Memorandum

To: Regional Administrator, Region IV, Salt Lake City, Utah From: Director, Bureau of Land Management Subject: Mineral Entries Approved for Patenting

Reference is made to your reports of January 19, 1949 involving applications Denver 056601 and 056606 of the Federal Oil Shale Company for patents to the Triumph No. 3 Group and the Crystal Group of oil shale placer claims in T. 5 S., R. 97 W., 6th P.M., Colorado. Final certificates were issued April 25, 1950.

The reports have been examined and found satisfactory. The mineral entries have been approved for patenting.

(Sgd) William Zimmerman, Jr.
(illegible)
Director

RLWilkinson:gb
10/19/50
Copy to: R.A., Reg. IV

• • • •

[1883]

PLAINTIFF'S EXHIBIT 119

United States Department Of The Interior Bureau Of Land Management Colorado State Office Denver, Colorado

November 28, 1955

(Field Number) Region (Date)

Report

Land district and serial No. C-09291, 09292 Date of examination June 23, 1955 Name Rea L. Eaton Field Examiner E. H. Montgomery Subject Mineral Applications Date September 29, 1954 (Application or proof)

Approved:

J. Elliott Hall
Lands & Mineral Officer

• • • •

[1884] In the letter, 1406942 "N" RLW, dated May 8, 1931, adverse proceedings were directed against the Champion No. 5 Claim charging that the annual assessment work had not been done for the year ending July 1, 1930. Notice of Proceedings of Contest 12626 was sent out May 15, 1931. No answer was received, and on October 3, 1931 the Commissioner, General Land Office declared the location null and void and closed the case.

In a letter dated June 15, 1932, Wade V. Lewis, Mining Engineer, General Land Office, recommended that adverse proceedings for lack of assessment work be directed against the Grand Valley Numbers 1-4, which were located August 6, 1904 by Chris Dere and others and which, while giving no legal description in the location notice, were believed to be in Sec. 6, T. 6 S., R. 96 W., 6th P.M. It is not known whether or not adverse proceedings were directed against the claims.

In any case, the decision declaring the Champion No. 5 null and void and the possible decision against the Grand Valley Numbers 1 and 2 may have been overruled by the Departmental decision on June 24, 1935, 55 LD 287, which held, in view of the U.S. Supreme Court decision of June 3, 1935, Ickes vs. Virginia-Colorado Development Corporation, 295 US 639, that the Department of Interior had no authority to declare a claim void for lack of performance of annual assessment work.

Oil and gas lease, C-09347, was issued December 1, 1954 for the lands embraced by the Champion No. 5 Claim. Lots 19 and 20, Sec. 1, T. 6 S., R. 97 W. have Stockraising Homestead Entries, Patents Numbers 1107-545 and 10911568.

* * * *

[1886] Conclusions and Recommendations:

While the claims have been declared null and void as previously mentioned, it is believed that the decision may have been overruled by the decision in 55 LD 287.

Also it is noted that no proofs of labor were found recorded in the county records.

[1887]

* * * *

Therefore, it is recommended that the applications of the Champion No. 5 and the Grand Valley Numbers 1 and 2 Claims be clear listed and allowed to proceed to patent, if otherwise in order.

Respectfully submitted,

E. H. Montgomery

[1888]

PLAINTIFF'S EXHIBIT 120

United States Department Of The Interior Bureau Of Land Management Colorado State Office 357 New Custom House, Box 1018 Denver, Colorado (Seal)

C-09291 C-09292 December 19, 1955

Memorandum

To. Land Office Manager From: Lands & Minerals Officer Subject: Mineral entries - Colorado 09291 and Colorado 09292 - Rea L. Eaton

Herewith is original and one copy of the approved report of E. H. Montgomery on the above entries.

It is recommended that patent be issued as to these entries which cover the Champion No. 5 and the Grand Valley Nos. 1 and 2 claims providing all other requirements have been met.

J. Elliott Hall
Lands & Minerals Officer

Enclosures

[1889]

PLAINTIFF'S EXHIBIT 121

United States Department Of The Interior Bureau Of Land Management Land Office - 357 New Custom House Denver, Colorado

February 3, 1956 Mr. Rea L. Eaton c/o Mr. John M. Dickson Mile High Center Denver, Colorado Colorado 09291

Dear Sir: Final Certificate in connection with Mineral Entry has been issued this date and forwarded to the Director, Bureau of Land Management, Washington, D. C.

The issuance of Final Certificate is an indication that this office finds satisfactory evidence has been submitted for the issuance of a patent.

Patent will be issued by the Director if all provisions have been complied with.

Sincerely yours,

George H. Woodhall
Land Office Manager

By: Frederick Fishman
Acting Land Office Manager

Clerk's Note: Exhibit No. 122, Final Cert. of Mineral Entry, is in separate Exhibit Book.

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[1891]

PLAINTIFF'S EXHIBIT 123

Office Memorandum - United States Government

To: Mrs. Rose M. Beall Date June 15, 1956 From: W. L. Shafer Subject: Champion No. 5 - Oil Shale Placer Patent Application - Serial No. Colorado 09291

The above-mentioned oil shale placer patent application has been reviewed by this office and it is recommended that you proceed to patent as requested by the Lands and Minerals Officer for Colorado.

W. L. Shafer

Attachment

Clerk's Note: Exhibit No. 124, Final Cert. of Mineral Entry 9/4/56, is in separate Exhibit Book.

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* * * *

[1893]

PLAINTIFF'S EXHIBIT 125

Colorado State Office Denver, Colorado 3 February 12, 1957

C-012327 July 24, 1956
Pacific Oil Company
Mineral Entry
September 30, 1955

Valuation Engineer
.....W. R. Sholes
/s/ J. Elliott Hall
Lands & Minerals Officer

Sixth Principal Meridian, Colorado
T. 6 S., R. 95 W.

Oyler No. 1 Placer — Sec. 10, Lots 1, 4, E ½NE ¼
Oyler No. 2 " — " 11, W ½NW ¼, N ½SW ¼
Oyler No. 3 " — " 11, E ½NW ¼, W ½NE ¼
Oyler No. 4 " — " 11, E ½NW ¼; Sec. 12, W ½NW ¼

Record Data:

An investigation was made as to these claims by the writer in 1927 and 1928. A copy of his report, dated February 28, 1929, is attached.

• • • •

[1894] Amendments:

The locators made amended locations as of October 3, 1916 and January 31, 1918, designating the claims as originally described, but adding information as to the purpose and legal authority.

Oyler No. 4 claim was amended on November 5 1918, to eliminate the northeast quarter of the claim and add in its place a forty acre tract south of and adjacent to the southeast quarter, thus taking in a portion of the rich oil shale cliffs or escarpment. This amendment, at least as to the latter tract, was void because of the intervention of the withdrawal on December 6, 1916, and creation of Naval Oil Shale No. 1 which covered this area. The attached plot shows the locations of the claims as above described (Exhibit A).

The purpose of the above explanation is to show the reasons for the placing of various improvements as described herein, most of which do not lie on the claims for which they were intended.

General Descriptions:

The claims lie on the top of the Book Cliffs plateau at an elevation of about 8700 feet. Though located in an air line less than 10 miles west of Rifle, Colorado, it was necessary to travel more than 45 miles to reach the lands by car because of the inaccessible character of cliffs and mountain slopes bordering the plateau.

The surface is mostly steeply rolling. A ridge separating the drainages of First Anvil Creek and Cottonwood Gulch extends westerly through three of the claims, No. 4 being intersected by a northward flowing branch of Anvil Creek, a tributary of Parachute Creek. The surface of the claims is mostly well sodded, supporting sage brush and grasses with scattering mountain mahogany and service brush, also large groves of aspen, especially on north and east slopes. Erosion has exposed bed rock in many places along the steep hillsides and in places in gulch bottoms.

The above cited report of February 28, 1929 was the result of an intensive survey for the principal purpose of locating and determining the value of assessment work done for the benefit of the claims. The report is attached as Exhibit B.

Geology and Mineral Characteristics:

The principal formation on the surface of the claims is the Upper Member (Evacuation Creek) of the Green River formation, Eocene age. The lower members and the underlying Parachute formation contain rich beds of oil shale, as shown on preliminary map No. 94, O. & G. investigations, U. S. Geological Survey. This was recognized many years ago and in the years 1917 to 1920 there was much activity in the area in the way of mining claim staking speculation. In subsequent years until about 1928 and 1929, several small test retorts were built and much experimental work done by private com-

panies to produce oil and its by-products from the oil shale.

[1895] This culminated in the tests made by the Bureau of Mines at their plants at Rulison and at their present location near the claims. The Bureau of Mines' results were so encouraging that a number of the larger oil companies are now planning experiments toward the commercial development of their oil shale holdings.

When commercial mining develops, it is believed that the rich mahogany zone of the Parachute Creek member, which is cliff forming, will be mined first, followed by other leaner zones as the need develops and the cost of deep mining becomes excessive. Consequently, the areas underlain by the richer deposits are the ones considered most valuable. The oil shale beds lie near horizontal, in this area, dipping slightly to the west. They are fairly uniform in thickness and quality for considerable distances as is shown by the measurements made at numerous points on outcrops and in drill holes.

The rich Parachute Creek member is exposed at various points on the claims. It directly underlies the Evacuation Creek member. A drill hole on Oyler No. 4 Placer, shows the content of oil in the various sections or beds penetrated (Drill Hole C, Sheet 2, Prelim. Map 94, O&G), and shows the combination of the oil shales throughout the area. Outcrops to the east, west and south also show this extension.

The Claims:

Oyler No. 1.

This claim lies mainly in the Evacuation Creek member and is covered with extensive groves of aspen timber. Along a gulch in the northwest quarter of the claim outcrops of good grade oil shale about two feet in thickness were found. These would lie on the claim as described in the patent application and would have been evident at the time the claims were located.

Development work claimed by the applicant consists of six opencuts, none of which are shown to be on the claim. As originally located, one of these, designated by the applicant as No. 1 (No. 13 in the early report, Ex.

B) is within the boundaries near the south line. It is now caved to some extent and difficult to obtain an accurate measurement. In 1927, it displaced about 64.8 cubic yards and was valued at $162.00. Another cut designated in Exhibit B as No. 14 is located about 250 feet south of the original claim boundaries but is in loose earth and sandy, shattered shale. It is not reported by the applicant and was not found in the 1956 examination. Its value was estimated at $44.00.

Five other cuts stated to be on Oyler No. 2 are claimed by the applicant for Oyler No. 1. The 1927-8 investigation showed four cuts only, located in the south central part of Lot 7, Sec. 10, about 1500 feet or more south of the original location of Oyler No. 1 and about 800 feet west of the original location of Oyler No. 2. These holes were dug for the benefit of Oyler No. 1 and were valued at $52.80, $241.51 and $100.00. Total $394.31. Being located more than ¼ mile from the claim, the applicability of the cuts to the claim is questionable. Their value would be as a possible site for extensive mine workings which is negated for two reasons (1) they have deteriorated to a point as to be unusable; (2) they are located on land in the ownership of the United States, withdrawn for the use of the Navy as Naval Oil Shale Reserve No. 1 and permission to use the [1896] Land for that purpose would be questionable. The applicant's designation of certain workings on Oyler Nos. 2 and 3 for the benefit of Oyler No. 1 is erroneous and impractical because the distance from Oyler No. 1 is at least 960 feet and there are intervening gulches which would further isolate the cuts from the claim.

Oyler No. 2:

Outcrops showing 2 feet of good oil shale occur below and to the southwest of an opencut designated as No. 5 in Exhibit B. This is located near the line between the NE ¼ SE ¼ and the NW ¼ SE ¼ on the north side of Cottonwood Gulch. Other outcrops also exist on the claim.

Applicant claims 3 opencuts for the benefit of this claim, only one of which is on the claim. He shows these

cuts to be located high on the ridges along the east-west center line of Sec. 11. No opencuts were found at the points designatedneither in the 1956nor in 1927-8.

However, in 1927 and 1928, 3 opencuts were found along the north side of Cottonwood Gulch in the NW ¼ SW ¼ Sec. 11, and an additional one was found near them in 1956. Other cuts were found along the point of a spur ridge in the same subdivision along the west line of the claim, all of which were constructed for the benefit of Oyler No. 2. All of these cuts are described in the report. Exhibit B, except the one found in 1956. This last one, designated as "G," is approximately 18 feet wide by 17 feet long to an 8½ foot face, wedge-shaped and caved. It displaces about 48 cubic yards and is reasonably worth $120.00. The remainder, Nos. 2, 8, 15, 21, 22, 23 and 25 to 29, inclusive, are all small holes having a total value of $81.90. They are now totally destroyed. Cuts Nos. 5, 5A and 5B, the three first mentioned in this paragraph, were valued at $64.20, $100.00 and $100.00 respectively. Totals for this claim are $466.10.

Oyler No. 3:

Applicant claims 3 opencuts on this claim in the SE ¼ NW ¼, Sec. 11. No holes were found at this point, but a group numbered 1, 1A, 3, 4, 6 and 7 were found within the boundaries of the original locations about 700 or more feet southeast in the NE ¼ SW ¼ of the section. The 1928 estimate of the value of these holes placed them at $860.00. (Exhibit B).

Another cut, improvement No. 9, appears to have been entirely destroyed by erosion. It could not be found.

A 3 foot bed of oil shale outcrops between holes 6 and 7 for a distance of 12 or more feet. It is fairly rich, containing an estimated 25 gallons or more oil per ton. Substantial outcrops were also noted in a gulch in the north part of Oyler No. 3.

Oyler No. 4:

This claim is the easternmost of the group and its southeast corner, as originally located, is near the escarp-

ment or cliff of the rich mahogany oil shales. A tributary to the East Fork of Parachute Creek flows northerly through the claim, originating in a spring located near the ¼ Section Corner between Secs. 11 and 12. In the canyon [1897] occupied by this stream are a number of outcrops of medium to rich shale, one of which occurs on the rounded hillside near the hole designated No. 1-4 by the applicant and No. 10, Exhibit B. This outcrop is 3 to 4 feet thick and of medium to low grade shale. It was observed in 1927 and 1928 and was no doubt in evidence in 1919 and 1920.

Applicant claims 3 opencuts as development work; one on Oyler No. 4 and two on Oyler No. 3. The one on Oyler No. 4 numbered 1-4 by the applicant was identified as No. 10 (Shown in Exhibit B). It was somewhat caved and partly filled with erosional materials but a check of its size indicated little change since measured in 1927. At that time it was valued at $89.00. No workings were found at the points on Oyler No. 3 where claimed by the applicant, but a group of opencuts is located about 700 feet to the southeast. None of the opencuts at this point have any value toward the development of Oyler No. 4 claim because (1) they are located at least 2,000 feet west of the claim; (2) the small sections of beds they expose could not be correlated with the formations on the claim; and (3) they could not be practically used as possible sites for mining operations in connection with the deposits on Oyler No. 4.

The 1927-28 investigation disclosed that four opencuts at the top of the escarpment near the line between the NW ¼ SW ¼ and the SW ¼ SW ¼, Sec. 12, just east of the east side line of the patented Sheridan Placer No. 20, has been dug for this claim. This area is included in the attempted amendment dated Nov. 15, 1918, void because of the intervention of the Naval Oil Shale withdrawal of December 6, 1916, for Reserve No. 1. The claimants evidently believed for several years at least,that the amendment was valid. Present claimants have not mentioned these improvements and have attempted to reinstate the claim to its status prior to Nov. 15, 1918 by filing a new amendment, dated September 13, 1955 by

which the boundaries as originally described, are again claimed.

The four opencuts last mentioned above are numbered in Exhibit B, Nos. 17, 18, 18A, 19 and 20, and given a total value of $591.10.

Other Improvements

Applicants advise that a road and trail, now in use by the Bureau of Mines for access to their experimental mine was built for the common benefit of the four claims. However, since it lies southeast of the claims and no part of it reaches the claims, it is not claimed as a patent expenditure.

This road and trail was measured and evaluated in 1928, prior to occupancy by the Bureau of Mines. At that time the road along a ridge measured 0.9 mile and the trail to the escarpment 2.4 miles long. The value was estimated to total $2,401.75 and was mentioned as being very high to cover any possible adversity due to high wages, severe weather conditions, etc. That this estimate was too high is shown by the applicant who states its computed value from records, is $1200.

[1898] If this road had been completed to the claims, its value toward development would have been unquestioned. Its practicability, however, to reach the claims, is nil. This was proven by the action of the Bureau of Mines, who used it to reach the point near the base of the cliff or escarpment where they established their mine, but found it more economical and feasible to reach the plateau just above by a long 45 mile route around the cliffs.

Duscussion.

As above described, there are natural exposures of oil shale on each of the four claims and it is evident that these exposures were, or could have been, observed prior to February 25, 1920, the date of the Leasing Act. These exposures occur within the boundaries of the claims as probably originally located and within the present boundaries as applied for.

Improvements actually benefiting the claims, as above described, are limited as follows:

Claim	Improvement	Value
Oyler No. 1	1 opencut	$ 162.00
Oyler No. 2	15 opencuts	466.10
Oyler No. 3	6 opencuts	860.00
Oyler No. 4	1 opencut	89.00
	Total	$1,577.10

The location of the claims is doubtful. Regardless of the description contained in the location certificates, the boundaries as staked on the ground would fix the areas for which patent would issue. As heretofore explained, it is probable that they were originally staked so as to adjoin the Sheridan Placers (Mineral Survey 19942) on the north, as indicated on the plat, Exhibit A. The location of the opencuts later dug, as well as the conformity of the boundaries to those of the Sheridans bears out this theory. Also, one of the locators of the Sheridan Placers was also a locator of the Oylers and the latter claims were located almost immediately following the location of the Sheridans. Careful search was made in 1927 and 1928 for the corner posts as described in the Oyler location certificates, but in the eleven year period following location they were evidently destroyed by weathering and erosion, aided by livestock and wildlife, as none identifiable were found.

Recommendations:

It is recommended that the applicant, the Pacific Oil Company, be called upon to furnish proof that the description of the claims as shown in the application for patent represents the location of the claims as originally staked on the ground.

[1899] If satisfactory proof is furnished, it is recommended that adverse charges be brought against the validity of Oyler Nos. 1, 2, and 4 placer mining claims, and that a complaint be issued, charging:

That improvements having a value of $500 worth of labor have not been made on or for the benefit of the Oyler Nos. 1, 2 and 4 placer mining claims.

(Signed) W. R. Sholes
Valuation Engineer

cc: U.S.G.S., Washington, D. C.
Sholes/mb

[1900]

PLAINTIFF'S EXHIBIT 126

Colorado State Office 339 New Custom House P. O. Box 1018 Denver 1, Colorado

Memorandum Nov 20 1957 WRS J

To Director - 5.04g From: State Supervisor, Colorado Subject: Denver Contest 12039 In Archives at Alexandria

You are requested to obtain and forward to us the complete file for Contest, Denver 12039, which involved the Oyler Placer Mining Claims Nos. 1 to 4, inclusive. It is believed this contest file is in the archives at Alexandria.

It is found that a review of this file will be of great assistance in the adjudication of the current application for patent for these claims, (Colorado 012327).

Lowell M. Puckett
State Supervisor

In dupl.

cc: Land Office L&M case file: C-012327 L&M reading SO reading

WRShoes/mb

[1901]

PLAINTIFF'S EXHIBIT 127

United States Department of the Interior Bureau of Land Management Colorado State Office 339 New Custom House P. O. Box 1018 Denver 1, Colorado (Seal)

In reply refer to: 5.22a-2 Denver Contest 12039 AV

Memorandum Jan 27 1958 To: Director - 5.04g From: State Supervisor, Colorado Subject: Denver Contest 12039 Return to Archives 51A27 3-A-109 Box 546023 546023

This office has reviewed the attached file. It may be returned to the Archives at Alexandria, as it has served its purpose.

J. Elliott Hall
Acting State Supervisor

Enclosure: Contest File 12039
In dupl.
cc: Area Admr - 5.20c-2

[1902]

PLAINTIFF'S EXHIBIT 128

5.22a-2 C-010319 Colorado State Office 339 New Custom House P. O. Box 1018 Denver 1, Colorado

Memorandum November 20, 1958 To: State Lands and Minerals Officer From: W. R. Sholes, Valuation Engineer Subject: Appn. for Min. Patent Colo. 010319 Weber Oil Co. - C. F. 4 0.S. Co. Nos. 19, 22, 28, 29 Oil Shale Placer Mining Claims

A review of the early files covering the subject claims discloses the following information:

File 40457 obtained from the Federal Center Archives, Denver, Colorado, contains a report by former Inspector O. J. Berry, dated July 16, 1927, detailing the results of his investigation of the subject claims and many others then under the control of one R. B. Denton. In this report he states, page 1, referring to 249 claims:

* * * *

Former inspector,Clarence C. Bradshaw, now in the Solicitor's office, investigated these locations and obtained affidavits from locators. He failed to obtain sufficient information to justify charges based on bad faith, dummies, etc.

[1903] The files show no evidence of abandonment. On the contrary some measure of assessment work or other control of the claims was evidenced at least to the year 1930.

Contest #11749 was instituted by adverse proceedings against CF 4 Nos. 1 to 36 on Dec. 17, 1927. The sole charge was lack of sufficient assessment work which was declared insufficient by the Supreme Court on June 3, 1935. Ickes v. the Virginia-Colorado Development Corp. (295 U.S. 639), consequently that action was of no avail and did not affect the status of the claims, though they were declared null and void by decision of the General Land Office.

In view of the above considerations, it is recommended that suspension of action awaiting review of the old files be abated and that normal procedure toward adjudication of the application be resumed.

(Signed) W. R. Sholes
Valuation Engineer (Mining)

Land Office
(initials illegible)

[1904]

PLAINTIFF'S EXHIBIT 129

United States Department of the Interior Bureau of Land Management Colorado State Office 339 New Custom House P. O. Box 1013 Denver 1, Colorado (Seal)

Memorandum November 20, 1958 To: State Land Office Manager From: State Lands and Minerals Officer Subject: Application for Min. Patent Colo. 010319 Weber Oil Co. - C.F. 4 O.S. Co. Nos. 19, 22, 28, 29 Oil Shale Placer Mining Claims

Herewith is copy of Valuation Engineer Sholes' memorandum relating to his review of the old files relative to these claims.

You are requested to resume adjudication of the case in accordance with his recommendation.

For the State Supervisor

J. Elliott Hall
Lands and Minerals Officer

Enclosures

L.O. Mgr.
Status
Accounts
Misc.
Olson Adjuc.
Info.
For Action
No Action
For filing

Remarks

[1905]

PLAINTIFF'S EXHIBIT 130

United States Department of the Interior Bureau of Land Management Colorado State Office 339 New Custom House P. O. Box 1018 Denver 1,Colorado (Seal) December 30, 1958

In Reply Refer To: 5.22b C-010319

Memorandum To: Director, 5.04a From: State Supervisor, Colorado Subject: Mineral Application C-010-319, C.F. 4 O.S. Co. Nos. 19, 22, 28, 29, oil shale placer mining claims.

The attached mineral application is forwarded for consideration and issuance of patent, if in order.

With reference to the third paragraph of your memorandum dated May 20, 1957, relative to the applicant waiving his rights to the surface of the stock raising homestead entry please refer to Paragraph 15, Page 5 of

the patent application wherein applicant states that he makes no claim to the surface rights of the land whereon the claims are located.

Oil and gas lease C-09487 which conflicted with the Mineral Entry has been relinquished by the oil and gas lessee. There are no other conflicts.

For the State Supervisor

Louis F. Fox
Acting Land Office Manager

Attachment
In duplicate (Received stamp)

Clerk's Note: Plaintiff's Exhibit No. 131, being Final Cert. of Mineral Entry 11/5/56 appears in a separate exhibit book.

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* * * *

[1907]

PLAINTIFF'S EXHIBIT 132

United States Department of the Interior Bureau of Land Management Colorado State Office 339 New Custom House P. O. Box Denver 1, Colorado

5.22a-2 C-012818 Seal (Received stamp)

Memorandum July 16, 1958 To: Land Office Manager From: Acting Lands and Minerals Officer Subject: C-012818, Robert A. Dick Hardison, et al Oil Shale Placers 12/30/58

A review of the files relative to the Hardison, Lucky Strike, Red Top, Evergreen, Carlyle, Black Eagle, Winner, Blue Bird, and Big Chief Placer Claims indicates that investigations made in 1929 and earlier resulted in Contests 12024 and 12024A. Commissioner's letter (GLO) "N" of Nov. 23, 1931 held the claims null and void except the Hardison and Carlyle. The contests were

based on lack of sufficient assessment work. No question was raised as to the validity of the claims based on legal requirements other than assessment work.

Any suspension of action pending the investigation herein should be terminated, and it is so recommended.

For the State Supervisor

Andrew J. Senti
Acting Lands and Minerals Officer

In dupl.
L. O. Mgr.
Status
Accounts
Misc.
Olson Adjuc.
Info.
For Action
No Action
For filing

Remarks

[1908]

PLAINTIFF'S EXHIBIT 133

Office Memorandum—United States Government

To: Chief, Patents Section Date: Feb 5—1959 From: Minerals Officer (Mining) Subject: Oil Shale Placer Patent Application Colorado 012818

* * * *

Conflicting oil shale placer claims have been noted and a schedule is attached. Each was declared null and void for failure to perform assessment work and not for any other reason. The reason for declaring these claims null and void in no way detracts from the validity of the subject claims.

* * * *

The application may now proceed to patent.

W. L. Shafer
Minerals Officer (Mining)

Attachment

[1909]

PLAINTIFF'S EXHIBIT 134

* * * *

Mineral Report

Mineral Patent Application of Barney L. Whatley for the G. M. Nos. 17 & 18 Placer Mining Claims (Title)

* * * *

By Frank W. Kuehnel
Valuation Engineer (Mining)
Approved

J. Elliott Hall
Lands and Minerals Officer
31748

"For Administrative Use Only"

[1910]

* * * *

On March 30, 1930, following an adverse report by Mining Engineer Warren R. Sholes, adverse proceedings against the claim on the charge of non-performance of assessment work was initiated. The claims were canceled by letter of July 28, 1930 for failure of the contestees to respond within the time limit allowed.

* * * *

[1911] General: Subject claims are located on the south slope of the stream valley of Kimball Creek, approximately 25 miles northwest of DeBeque, Colorado. The topography is similar to other oil shale land in the vicinity, consisting principally of plateau land dissected by deep gulches. Cliffs border the plateau land and form an almost inaccessible escarpment along the hills.

A heavy cover of "buck brush" or mountain mahogany covers subject claims with small non-commercial groves of spruce at the higher elevations and pinon and juniper along the lower portions of the claims adjacent to Kimball Creek.

Although several water courses intersect the claims along north-south gulches, the water courses are intermittent and are flowing only in early spring. The only perennial stream in the area is the east-west flowing Kimball Creek which is located to the north of G.M. 17 and G. M. 18. The claims were originally located in accordance to the land survey of Feb. 9, 1885. A resurvey of the lands by the independent Government, approved October 29, 1927, placed the position of the G.M. 17 and G.M. 18 at variable distances from the original position.

No old corners were located during the examination of May 15, 1958, but the present claims were found to conform to the location of the second survey.

The same problem arose during the examination of G.M. Nos. 1 - 16, (Whatley Application C-05019 and Mineral Patent 11445945) and was resolved by the applicant's conformance to the subdivision of the resurvey.

Geology: In the DeBeque oil shale area the oil shale occurs in the Green River Formation of Eocene Age, which is a division of the Tertiary Period. The formation dips at a low angle towards the center of the Piceance Creek Basin and is made up of interbedded sandstone, shales, and other Kerogen bearing rocks. The individual oil shale beds occur as several distinct types: brown or black massive hales, with conchoidal fracture: thin bedded paper shales, and irregularly laminated and/or contorted shale beds. The latter variety was found in outcrops on subject claims. Correlation of these beds from one measured section to another is difficult, as a large variation in both thickness and oil content occurs. The outcrops on the subject claims appear to be in the lower shale member of the Green River, which generally contain some beds rich in Kerogen. The Kerogen containing material on these claims appears to be in a marlstone rather than a true shale.

* * * *

[1913]

* * * I hereby recommend that a patent be issued to Barney L. Whatley under Mineral Application C-020379.

* * * *

[1914]

PLAINTIFF'S EXHIBIT 135

Minerals Work Sheet

M. E. C020379: Land District Colorado References are to 43 CFR Name of claim G, M. 17 G. M. 18 Kind of deposit Oil Shale 185.54-71-73

* * * *

Contest 12261 involved failure to do assessment work and is immaterial.

O)&G lease C013107 cancelled by decision June 23, 1959 no appeal and lessee has made application for repayment. of rental.

C. Le Roy Olson Examiner
February 27, 1958, 19

[1915]

PLAINTIFF'S EXHIBIT 136

United States Department of the Interior Bureau of Land Management Colorado State Office 339, New Custom House P. O. Box 1018 Denver 1, Colorado

(Seal) In reply refer to 5.22b C-020379 M. E.

December 21, 1959 Memorandum To: Director From: State Supervisor, Colorado Subject: Colorado 020379

Attached is application for patent to G. M. # 17 and G. M. # 18, oil shale placer mining claims filed by Barney L. Whatley, for consideration in issuance of patent if in order.

Oil and gas lease Colorado 013107 was canceled by decision dated June 23, 1959. The period in which to appeal that decision has expired, and no appeal has been received. There are no other conflicts.

Charges were brought against the subject claims in contest proceeding No. (illegible) for failure to do assessment work. By letter number 1290989 "N" CRV, dated July 19, 1935, the Denver Land Office was instructed to close all cases involving adverse proceedings against mineral locations or entries where the charge was failure to do assessment work. Therefore, contest 12261 is not considered as a bar to issuance of patent in the subject case.

For the State Supervisor,

Dale R. Andrus
Land Office Manager

Enclosure (Received stamp)

* * * *

[1916]

PLAINTIFF'S EXHIBIT 136-A

Address only the Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington

Jul 17 1935 In reply please refer to Denver 042108 "N" CRB Information.

Mr. Edward Oltenbern, De Beque, Colorado.

My dear Sir: Replying to your letter of June 25, 1935, addressed to the Register of the United States land office, Denver, Colorado, and referred here for reply, you are advised that on June 3, 1935, the Supreme Court of the United States held in the case of Ickes, Secretary of the Interior, vs. Virginia-Colorado Development Corporation that the oil shale claimant lost no rights by failure to do the annual assessment work on its claims, that such failure gave the Government no right to declare the claims null and void, and that the proceedings brought by the Government against the claims, based solely on that ground, went beyond the authority conferred by law and did not affect the validity of the claims.

[1917] In view of that decision the Department, on June 24, 1935, in the case of the Shale Oil Company, Denver mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case and overruled all its previous decisions in conflict with the decision of the Supreme Court.

You are, therefore, advised that so far as the jurisdiction of this office is concerned, any declaration by it that an oil shale placer claim is null and void based solely on a charge that the claimant failed to perform annual assessment work or resume work on the claim is void and does not affect the right of the owner of the claim to maintain his possession thereof under the mining laws.

* * * *

[1918] Very respectfully,

Fred W. Johnson
Commissioner

7-16 edt

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* * * *

[1921]

PLAINTIFF'S EXHIBIT 138

United States Department of the Interior Bureau of Land Management Colorado State Office Denver, Colorado

November 21, 1955

(Field number) (Region) (Date)

Report

Land district and serial No. C-010007 Date of examination June 22, 1955

Name A. H. Powell Field examiner E. H. Montgomery

Subject Mineral Application Approved:

Date January 10, 1955 (Application or proof) J. Elliott Hall Lands and Minerals Officer

* * * *

[1924] This claim was declared null and void by the Commissioner of the General Land Office. On May 9, 1929 a report, (F.D. 44929) by Mining Engineer A. C. Kinsley, was furnished the General Land Office. The the letter, 1339694 "N" UEG, dated May 31, 1929, from the Commissioner, adverse proceedings were directed against the Massive Claim, among others, for lack of assessment work. On June 26, 1929 a Notice of Proceedings of Contest No. 12032 was sent the owners of the claims (John D. and Reese Carlisle and Grant Bales). On July 15, 1929 an answer was filed by the defendants admitting that assessment work was not performed for the years ending July 1, 1927 and July 1, 1928, and giving as reason that the land was classified as coal land. A Motion for Judgment by Confession by the District Law Officer, General Land Office, was filed before the Commissioner, dated July 29, 1929. An answer by the defendants was also filed before the Commissioner claiming right to resume labor depending on the Decision of the U.S. Supreme Court in the famous Emil L. Krushnic Oil Shale Case (A-10053, Glenwood Springs 022364). After the Krushnic decision of January 6, 1930 (280 U.S. 306) the charges were amended by the letter of May 13, 1930 to the one charge that the assessment work was not performed on the Massive Claim, among others, for the years ending July 1, 1927, and July 1, 1928 and that work has not since been resumed, the Notice of Proceedings being sent on May 26, 1930. The defendants failed to answer the charges and in the letter of August 16, 1930 the Commissioner declared the claims, including the Massive, null and void and closed the case.

This decision was overruled by the Departmental Decision on June 24, 1935, 55 L.D. 287, which held in view of the U.S. Supreme Court Decision of June 3, 1935, Ickes v. Virginia - Colorado Development Corp., 295 US 639, that the Department of Interior had no authority to declare a claim void for lack of performance of annual assessment work.

* * * *

The land is embraced in O & G Lease C-03971, issued February 1, 1955.

* * * *

[1926] Conclusions and Recommendations: While the claim has been declared null and void as previously mentioned, it is believed that the decision in 55 L.D. 287 overruled this decision.

* * * *

Clerk's Note: Plaintiff's Exhibits No. 139 - Mineral Work Sheet 11/25/57; No. 140 - Final Cert. of Mineral Entry - appear in separate exhibit book.

[1931]

PLAINTIFF'S EXHIBIT 141

Office Memorandum - United States Government 5.04a

To: Chief, Patent Section From: Mineral Officer, Mining Subject: Oil shale patent application Colorado 010007, Alfred Heber Powell Date: Jun 26, 1958

The subject case has been reviewed for issuance of patent regarding any previous charges which would nullify the Massive mining claim, subject of the application for patent.

* * * *

The claim was declared null and void for failure to do assessment work only, on May 26, 1930. This decision was overruled by departmental decision on June 24, 1935, Ickes vs. Virginia-Colorado Development Corporation, 55 L. D. 287.

Therefore, the subject case may proceed to patent.

Minerals Officer, Mining
W. L. Shafer

10007 116

[1932]

PLAINTIFF'S EXHIBIT 142

Form 4-802 (February 1958) Serial Number C-016671

United States Department of the Interior Bureau of Land Management Area 3

Mineral Report

* * * *

November 7, 1958
(Date) of Report

By Frank W. Kuehnel
Valuation Engineer (Mining)

cc: Director
U.S.G.S.
Washington, D.C.

Approved

J. Elliott Hall
Lands and Minerals Officer
GPO 853247

[1933]

* * * *

Recommendations: In compliance with the Director's memorandum of November 22, 1957, and in the best interest of the Government, it is recommended that:

a. Patent proceed immediately on Liberty Bell Nos. 2 to 12, inclusive, Placer Mining Claims; all else being regular.

* * * *

[1934] Adverse proceedings were directed against the subject claims by office letter "N" of June 30, 1930, on the charge "That annual assessment work to the value of $100 was not performed upon each or any of the Liberty Bell Nos. 1-12, inclusive, oil shale placers for the year ending July 1, 1929, and that work has not since been resumed." The charge was not contested and the claims were declared null and void to the extent of 4 of the 8 claimants of record of July 31, 1931, by Commis-

sioner's letter 123037 "N" VEG, dated July 21, 1931 (Contest 11758). The claims were reactivated by Tell Ertl of Grand Valley, Colorado, and Henry L. Price, Silmon Smith and Charles Holmes, both of Grand Junction, Colorado, under Application C-016671.

• • • •

[1943]

PLAINTIFF'S EXHIBIT 144

September 9, 1957

Memorandum To: Area Administrator, Area 3 From: Director, Bureau of Land Management Subject: Sufficiency of Discovery for Oil Shale Placer Claims

Reference is made to your memorandum of February 27, 1957, in which you request clarification, in light of Freeman v. Summers (52 L.D. 201) and Standard Shales Products Company v. Summers, United States, Intervenor (on rehearing), of the sufficiency of discovery on the 27 mining claims listed under Item 3, page 4 of Valuation Engineers Sholes, Montgomery, and Dow memorandum of October 26, 1956, to the Colorado Land and Minerals Officer.

• • • •

The Department concluded on May 10, 1920 (47 L.D. 543) that oil shale is a valuable mineral subject to location and entry under the mining law. These "instructions" have never been overruled or vacated and they bind the Bureau until they have been.

As stated in Freeman v. Summers: "The evidence in this case shows that in this particular area of Colorado, the lands contain the Green River formation, and that this formation carries oil shales in large and valuable quantities, that while the beds vary in the richness of their content, the formation is one upon which the miner may rely as carrying oil shale which, while yielding at places comparatively small quantities of oil, in other places yields larger and richer quantities of this valuable mineral.

• • • •

[1944] In summary, the question of sufficiency of discovery for oil shale placer claims in any area occupied by the Green River formation has been resolved where the conditions are comparable to those found in the lands involved in Freeman v. Summers, supra.

Acting Director

* * * *

[1952]

PLAINTIFFS EXHIBIT 149

(Seal) In reply refer to: 5.22b C-08055 M.E.

United States Department of the Interior Bureau of Land Management Colorado State Office 339, New Custom House P. O. Box 1018 Denver 1, Colorado

November 24, 1959 Memorandum To: Director - 5.04a From: State Supervisor, Colorado Subject: Case File C-08055, Mineral Patent Application, Silmon Smith

Attached application for patent is forwarded for consideration and issuance of patent, if in order.

The lands covered by the application are embraced in oil and gas lease offer C-021229 which has been suspended. The offer to lease will be rejected upon issuance of patent. There are no other conflicts.

The mineral report of the Lands and Minerals Division clear-listing the claims for patent is in the file.

For the State Supervisor

Dale R. Andrus
Land Office Manager

Attachment (Received stamp)

[handwritten notice] Case file 1337597, Contest 12025, has been reviewed for charges regarding assessment work.

All appears in order and patent may issue.

Robert F. May
Minerals Staff Office
12/15/59

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* * * *

[1956]

PLAINTIFF'S EXHIBIT 151

Address only the Commissioner of the General Land (illegible)

United States Department of the Interior General Land Office Washington

In reply please refer to 1337597 "N" UEG Sep 15 1931

United States vs. A. E. Templeman, et al. :R. Contest 12025. :Locations null and void. :Oil shale.

Register, Denver, Colorado.

Sir: By office letter "N" of May 16, 1931, the North Star Nos. 1, 2, 3, 4,embracing, respectively, the NW ¼, SE ¼, SW ¼, NE ¼ Sec. 2, North Star No. 5, NW ¼ Sec. 12, North Star No. 6, SW ¼ Sec. 1, West Star Nos. 1, 2, 3, 4, embracing, respectively, the E ½ E ½, W ½ E ½, E ½ W ½ W ½ W ½ Sec. 2, South Star Nos. 1, 2, 3, 4, embracing, respectively, the E ½ E ½, W ½ E ½, E ½ W ½, W ½ W ½ Sec. 10, Snow Crest Nos. 1, 2, 3, 4, embracing, respectively, the E ½ E ½, W ½ E ½, E ½ W ½, W ½ W ½ Sec. 11, T. 6 S., R. 100 W., 6th P. M., oil shale placers were held to be null and void, subject to the right of appeal within thirty days from notice to the Secretary of the Interior.

Your report in this case by letter of August [1957] 12, 1931, shows service was had on the three claimants of record June 15 and 17, 1931, and you report that no response has been made.

The North Star Nos. 1 to 6, inclusive, West Star Nos. 1 to 4, inclusive, South Star Nos. 1 to 4, inclusive and

Snow Crest Nos. 1 to 4, inclusive, oil shale placers are declared null and void and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed.

Advise the parties by ordinary mail.

Very respectfully

(Sgd) C. C. Moore
Commissioner.

9-14-mes

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* * * *

[1960]

PLAINTIFF'S EXHIBIT 154

Memorandum May 19 1960 To: Associate Director From: Minerals Staff Officer Subject: Comments on Thesis of George R. Schmidt

* * * *

4. A few criticisms of the thesis are as follows:

(a) Page 2. Patent applications are not adjudicated by the minerals staff officer. Oil shale patent applications are checked, not because of any special know-how, but because of access in Washington to a unique set of plats with extensive oil shale information.

* * * *

[1961]

Max Caplan
Minerals Staff Officer

* * * *

[1962]

PLAINTIFF'S EXHIBIT 154-A

5.04a (name illegible) Caplan 2/15/62 (name illegible)

Memorandum Feb 23 1960 To: Solicitor From: Director, Bureau of Land Management Subject: Recommendation to consider initiation of a suit to cancel patent

Attached are patent case files Nos. 1143461 (C-04975) and 1184014 (C-010007) which contain the record of patent proceedings in which patents were issued to Alfred Heber Powell, embracing a total of 30 oil shale placer claims.

• • • •

[1963] The claims were subsequently contested and declared null and void for non-performance of assessment work. This declaration of invalidity had no effect and did not proscribe subsequent issuance of patent.

• • • •

Edward (name illegible)
Director

Attachment

• • • •

[1972]

PLAINTIFF'S EXHIBIT 156

United States Department of the Interior Office of the Solicitor Denver Regional Office Room 21, Building 53 Denver Federal Center Denver 25, Colorado

Bureau of Land Management 1 State Supervisor (initials illegible) 3 Land Office 2 Lands & Minerals (initials illegible) Range & Forestry Administration For Action . . . . For Filing . . . . (illegible)

(handwriting illegible)

Memorandum Dec 11 1959 To: State Supervisor, Bureau of Land Management, Denver, Colorado From: Regional Solicitor Subject: Contest No. 147 (Colo.)—Hoffman Nos. 11, 12, 13 and 14 placer mining claims—John W. Savage

You will recall that at the time of the prehearing conference of the subject case that consideration was given to the filing of an amended complaint charging that the claims were null and void pursuant to decisions of the Commissioner of the General Land Office which

were rendered prior to the *Ickes* v. *Development Corporation* decision and which were not appealed.

We have been advised by the Associate Solicitor, Public Lands, that it is the position of the Department that the decisions of the Commissioner of the General Land Office involved herein were void and of no effect in this connection, were subsequently withdrawn and, as a result, the plea of previous judgment or res judicata is not to be applied in these or similar cases.

Bryan L. Kepford
For the Regional Solicitor
Denver Region

	To	Init'l.	Date
Copy to: Area Administrator, Area 3, BLM, Denver, Colorado	1	Manager Mgr. Sec'y.	12/22
	2	Minerals	Olson
		Lands	
		Expediter	
		Info. Ofcr.	
		Accounts	
		Docket	

[1973]

PLAINTIFF'S EXHIBIT 157

Copy DMR Jul 6 1961 Memorandum To: Associate Solicitor, Division of Public Lands From: Regional Solicitor Subject: Oil shale locations declared null and void solely for failure to perform assessment work—Your memorandum of December 3, 1959 (Your reference I-59-2080.10a)

The above-noted memorandum concludes that contests against oil shale placer claims which are based solely upon failure to perform assessment work which resulted in a declaration that the claims were null and void by Department of the Interior decisions which were not appealed are not to be considered as res judicata. The conclusion of the memorandum was based upon the hold-

ing in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935), and certain statements to the effect that the decisions of the Department in this regard are void in Shale Oil Company, 55 I.D. 287 (1935). It was reasoned that the Shale Oil Company case had thus effectively nullified all Departmental decisions declaring oil shale placer claims null and void for this reason. The memorandum held that since the doctrine of res judicata does not apply to decisions which are void, it should not be applied to these oil shale contests.

* * * *

[1982] We recognize that it has been the custom of the Bureau of Land Management to ignore the effect of these decisions in adjudicating oil shale patent applications.

* * * *

[1983] Bryan L. Kepford
For the Regional Solicitor
Denver Region

Enclosure

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* * * *

[2011]

PLAINTIFF'S EXHIBIT 175

Address only the Commissioner of the General Land Office Enc. United States Department of the Interior General Land Office Washington Jul 17 1935 In reply please refer to 1609571 "N" CRB Information.

Hon. Edward T. Taylor, House of Representatives.

My dear Mr. Taylor: I have received your letter of July 12, 1935, with enclosed letter to you from Mr. Harry Flynn of Silt, Colorado, relative to the status of oil shale placers heretofore declared to be null and void because of failure to perform the annual assessment work or to resume work before a challenge against the validity of the claims was made by the Government.

The Supreme Court of the United States on June 3, 1935, held in the case of Ickes vs. Virginia-Colorado Development Corporation that the oil shale placer claimant, appellee therein, lost no rights by failure to do annual assessment work on its claims, that such failure gave the Government no right to declare the claims null and void, [2012] and that the proceedings brought by the Government against the claims on the sole ground of failure to perform such work went beyond the authority conferred by law and did not affect the validity of the claims. Under date of June 24, 1935, the Department, in the case of the Shale Oil Company, Denver mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case and overruled its previous decisions in conflict with the decision of the Supreme Court.

The Supreme Court having held that there is no authority of law for a proceeding by the Government against oil shale placers on the grounds stated above, and the Department having overruled all its conflicting decisions, it seems obvious that any declaration that such claims were null and void, heretofore made by this office solely upon that ground, are without legal effect and void.

Mr. Flynn's letter is returned and a copy of this letter is enclosed herewith.

Very respectfully,

Fred W. Johnson
Commissioner.

7-16 edt

[2013]

PLAINTIFF'S EXHIBIT 176

Appendix C-6 The Secretary of the Interor Washington Oct 31 1935

The Honorable The Secretary of the Navy.

My dear Mr. Secretary: Reference is made to the letter of November 1, 1933, of Secretary Ickes, containing

a list of oil shale placer mining claims, with descriptions of the land involved, situated within Naval Oil Shale Reserves Nos. 1 and 3 in Colorado and No. 2 in Utah, involved in adverse proceedings, and the status of each case.

The adverse proceedings involving all of the said claims were based upon a charge that annual assessment work had not been performed upon the claim or claims involved for a stated assessment year and that work had not been resumed thereon. You were informed in the above-mentioned letter that certain claims had been declared null and void in their entirety and others had been declared null and void to the extent of the interests of the parties served with notice, and that further action in all pending cases involving the question of assessment work on oil shale placers was suspended in this office pending a final decision in the courts upon the matter of the authority of this Department to attack the validity of oil shale placer claims upon the ground stated.

On June 3, 1935, the Supreme Court, in the case of *Ickes* vs. *Virginia-Colorado Development Corporation*, held that the United States is without authority to challenge the validity of an oil shale placer claim on account of failure to perform the annual assessment work, or to resume work, thereon. All previous action taken upon such charges in the cases referred to therefore is without effect and void. The status of the claims so far as this Department is concerned is that they are subsisting claims which, if located on valid discoveries of mineral by qualified locators, segregate the land against its subsequent withdrawal for Naval Oil Shale Reserves unless the claims have been abandoned.

Sincerely yours,

Charles West
Acting Secretary of the Interior

(initials illegible)

[2014]

PLAINTIFF'S EXHIBIT 177

The Secretary of the Interior Washington Nov 1, 1933

(Signed) Bradshaw Goerner Altizer Obenchain Johnson

The Honorable, The Secretary of the Navy

My dear Mr. Secretary: Reference is made to my letter of October 14, in reply to your letter of September 30, relative to Naval Oil Shale Reserves Nos. 1 and 3 in Colorado, and No. 2 in Utah, in which it was stated that the records of the General Land Office were being examined, and that you would be advised of the action had on mining locations within the said reserves as to which you have not been heretofore informed.

In order that you may have a complete record of the present status of all unpatented oil shale placers within these Reserves the following (word illegible) of the last action taken as to each claim or group of claims is supplied.

Lucy Agnes No. 1, N½ N½ and Lucy Agnes No. 2, S½ N½ Spc. 4, T. 5 s., R. 95 W., 6th P.M., were declared null and void on August 18, 1930, as to the interests of all claimants.

* * * *

[2016] Oyler No. 1, NE¼ Sec. 10, Oyler No. 2, W½ NW¼, N½ SW¼ Sec. 11; Oyler No. 3, E½ NW¼, W½ NE¼ Sec. 11 and Oyler No. 4 E½ NE¼ Sec. 11 and W½ SW¼ Sec. 12, T. 6 S., R. 95 W., 6th P.M. were declared null and void April 27, 1932, as to the interests of all claimants.

* * * *

[2019] Sincerely yours,

(Sgd) Harold L. Ickes
Secretary of the Interior

[2020]

PLAINTIFF'S EXHIBIT 178

United States Department of the Interior Bureau of Land Management Washington 25, D.C. (seal) (numbers illegible)

Detwiler Duckworth (name Illegible)

Memorandum Sep 30 1949 To: Director, Bureau of Mines From: Director, Bureau of Land Management Subject: Oil Shale Claims in Colorado

* * * *

[2021] After the passage of the Leasing Act, the Department endeavored, by adverse proceedings, to clear the public lands of oil shale placer locations on which little or no work had been done toward development of the oil shale placer deposits, and eventually two of these cases reached the United States Supreme Court. On January 6, 1930, in the case of Wilbur vs. United States (280 U.S. 318), and on June 3, 1935, in the case of Ickes vs. Virginia-Colorado Development Corporation (295 U.S. 639), the court held in effect that oil shale placer claims, each of which had been perfected by a valid discovery of oil shale, were protected by section 37 of the Leasing Act, and that the failure to do the $100 worth of assessment work annually for the benefit of each claim, as required by the United States mining laws, did not forfeit the claims to the Government, but only rendered them subject to loss through relocation by other persons if the assessment work was not commenced or resumed before such relocation was made.

By its decision of June 24, 1935, in the case of the Shale Oil Company (55 I.D. 287), the Department overruled all prior decisions and regulations of the Land Department insofar as they conflicted with the decision.

* * * *

[2022] If the Oyler Nos. 1, 2, 3 and 4 were each perfected by a valid discovery of oil shale made prior to leasing act of February 25, 1920 or the claimants were then in diligent prosecution of work looking to a discovery on each which was continued to a valid discovery and the

claims were not thereafter abandoned, the locators or successors would have valid claims, which, upon application and compliance with the regulations might be carried to patent.

* * * *

Rosco Bell
Associate Director

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* * * *

[2024]

PLAINTIFF'S EXHIBIT 180

Appendix C-3 Address only the Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington May 4 - 1936

In reply please refer to 1283120 "N" CRB Information

Ida Dere, Box 477, Grand Valley, Colorado

Madam: Replying to your letter of April 22, 1936, you are advised the records of this office show that the Lucy Agnes Nos. 1 and 2 oil shale placers were declared null and void by this office on August 18, 1933, because of failure of the owners of the claims to file answer denying the charge that annual assessment work had not been performed on the claims for the year ending July 1, 1929, and that work had not been since resumed.

On June 3, 1935, the Supreme Court of the United States held in the case of Ickes vs. Virginia-Colorado Development Corporation, that the oil shale placer claimant, a party in that case, lost no rights [2025] by failure to do annual assessment work on its claims and that such failure gave the Government no right to declare the claims null and void. It further held that proceedings brought by the Government based solely on such a charge went beyond the authority conferred by law and did not affect the validity of the claims. In view of this holding of the Supreme Court, this office considers that it would be unnecessary to revoke its previous decision holding the

Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the title arising from the location of the claims.

Very respectfully,

Fred W. Johnson
Commissioner.

4-30 mo

[2026]

PLAINTIFF'S EXHIBIT 181

51A27 3-A110 Box 546145

Box 477 Grand Valley, Colorado. April.22, 1936

Commissioner General Land Office, Washington, D.C.

Please advise the undersigned Ida Dere, why Lucy AgnessOil Shale Claims.Nos. 1 and 2. (being N½,N ½ and S½ N½ ,Sec 4,Township 5 South 95 West) should not be clear listed from the charge of "failure to do and preform annual assessment work" Being contest No. 11750, in keeping with and per tenor of your letter dated 7/29/35, which ordered the clear listing of Liberty Oil Shale Claim No 1, being contest No. 11823, address (word illegible) Register of Denver Land Office.These two claims were valid existing claims on 2/25/20, with several years assessment work having since been done. The field Division Inspectors convinced me on or about the year 1927or 28,that it would be useledd to go to the expense of answering the Government contest, but the Supreme Court Decision of 6/3/35,seemingly has det at naught all of these formrn challenges, where the only question was lack of assessment work.Please clear list my said claims or advise me what must be done to get them clear listed.

Yours Respectfully,

Ida Dere,
Grand Valley Colorado.

Answered 4/36 RBN 11750 25 Received Apr 27 1936
G. E. O. 000017

[2027]

PLAINTIFF'S EXHIBIT 182

Bowie & Groves Attorneys at Law First National Bank Building Grand Junction, Colorado March 25, 1936.

The Commissioner of the General Land Office, Washington, D.C. Dear Sir:

* * * *

I represent the Marshall estate, and I am writing in behalf of the executor and heirs at law to request such information as your office may be able to give us relative to the present status of such claims under the decision of the United States Supreme Court in Ickes vs. Virginia-Colorado Devopment Corporation, rendered June 3, 1935, and reported in 295 U. S. 639, wherein that Court held a claimant lost no rights by failure to do annual assessment work subsequent to passage of the Leasing Act, and that the Department of the Interior was without authority to cancel such claims for any such failure to do assessment work.

* * * *

[2028] If any proceedings may be required on the part of the Marshall estate to reestablish record of its rights in these claims, will you kindly give us your suggestions with reference thereto.

Yours very truly,

Alex Bowie

AB:H

[2029]

PLANTIFF'S EXHIBIT 183

United States Department of the Interior General Land Office Washington Apr - 7 1936

In reply please refer to 1341637 "N" CRB

Mr. Alexander Bowie, Attorney at Law, First National Bank Building, Grand Junction, Colorado.

My dear Sir: Replying to your letter of March 25, 1936, you are advised that as a result of the decision of the Supreme Court in the case of Ickes vs. Virginia-Colorado Development Corporation, the Department, on June 24, 1935, recalled and vacated its decision in the Virginia-Colorado Development Corporation case and overruled all of its previous decisions in conflict with the decision of the Supreme Court.

In view of the Supreme Court's decision and of the action taken by the Department, it is clear that a declaration holding a mining claim to be null and void because of failure to perform the annual assessment work is without effect and that the owner of the claim would still be en- [2030] titled to resume work on the claim in the same manner as if no adverse decision had been made. The decisions of this office in the cases referred to in your letter were based solely on the ground of failure to perform the annual assessment work on the claims.

Very respectfully,

Fred W. Johnson
Commissioner

4-6-eim

[2031]

PLAINTIFF'S EXHIBIT 184

Address only the Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington 8/26/31

In reply please refer to 1337065 "N" CRB

United States vs. Estate of L. O. Marshall, et al.

R. Contest 12036. Motion for stay of proceedings: denied. Claims found to be null and void.

Register, Denver, Colorado.

Sir: By office letter of June 11, 1929, as amended by office letter of May 29, 1930, adverse proceedings were

directed against the Phenol No. 1, et al., oil shale placers upon the following charges:

1. That F. M. Dunlap and A. A. Dunlap, two of the locators of the claims, are dummy locators.
2. That annual assessment work to the value of $100 was not performed upon each or any one of the Phenol Nos. 1 to 42, inclusive, 44, 47 to 53, inclusive, 60 and T.N.T. No. 13 oil shale placers for the year ending July 1, 1929, and that work has not been since resumed.

Charge No. 1 was dismissed by office letter of April 23, 1931, because the same charge involving other claims had not been sustained by the Government in another proceeding.

* * * *

[2035] The evidence of the Government's witnesses is sufficient when not controverted by the defendant to sustain the charge and the claims are therefore declared to be null and void, subject to the defendant's right of appeal to the Secretary of the Interior within 30 days from notice.

Very respectfully,

Sgd Thomas C. Hovell
Acting Commissioner.

[2036]

PLAINTIFF'S EXHIBIT 185

Address only the Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington Nov 19, 1931

In reply please refer to 1341637 "N" RLW

Oil shale. R. Contest 12038. Locations null and void. Case closed.

Register, Denver, Colorado.

Sir: By office decision of October 12, 1931, the T.N.T. Nos. 1 and 2 in T. 5 S., R. 99 W., 6th P.M.,oil shale placers were declared null and void to the extent of the interests of 10 of 11 parties of record because of their failures to file answers to the charges directed by the Chief of Field Division on July 1,1931.

That annual assessment work to the value of $100 was not performed upon each and every one of the T N T Nos. 1 and 2 oil shale placers for the year ending July 1, 1930, and that work had not been resumed on each of said claims June 17, 1931, when a challenge to the validity of each of said claims was posted thereon on behalf of the United States.

That annual assessment work to the value of $100 was not performed upon each or any of the said claims for the year ending July 1, 1930, and that work has not since been resumed.

[2037] Notice of the charges was served on the remaining party on July 25, 1931, and in your letter of October 16, 1931, you stated that no answer was filed by the party within the time allowed.

The failure of the contestee to file answer denying the charges is taken as an admission by him of the truth thereof, in view of which the T.N.T. Nos. 1 and 2 oil shale placers are declared null and void in their entirety and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed.

Advise the party hereof by ordinary mail.

Very respectfully,

(sg) C. C. Moore
Commissioner

mc

[2038]

PLAINTIFF'S EXHIBIT 186

14x R. 1x C.F.D.

United States Department of the Interior General Land Office Washington Jan 9 1932

In reply please refer to 1332500 "N" RLW

Oil shale. R. Contest 12004. Locations null and void. Case closed in part.

Register, Denver, Colorado.

Sir: By office decision of October 12, 1931, the Hydrocarbon Nos. 184 to 187, inclusive, oil shale placers, were declared null and void as to the interest of one of seven parties reported as having interests in the claims because of his failure to file answer to the charge directed by office letter "N" of April 23, 1931:

That annual assessment work to the value of $100 was not performed upon each or any one of the Hydrocarbon Nos. 184 to 187, inclusive, oil shale placers, for the year ending July 1, 1930, and that work has not been since resumed.

The names of the heirs of three of the remaining parties and the names of the heirs of an additional party having been furnished by the Chief of Field Division, notices [2039] of the charge were served on 14 of the 20 parties now reported as having interests in the claims on April 30, May 1, 2, 4 and 6, October 23, 1931 and in your letter of December 1, 1931 you stated that no answers were filed by the parties served within the time allowed.

The failures of the contestees served with notices to file answers denying the charge are taken as admissions by them of the truth thereof, in view of which the Hydrocarbon Nos. 184 to 187 oil shale placers are declared null and void to the extent of the interests of the parties served and the United States has taken possession of the lands within the claims for its own uses and pur-

poses. The case is closed to the extent of the interests of the parties served.

Advice the parties hereof by ordinary mail.

Very respectfully,

Commissioner.

1-6-mr.

* * * *

[2042]

PLAINTIFF'S EXHIBIT 187

United States Department of the Interior General Land Office Washington 1332-500

In reply please refer to 1332500 "N" RLW

Oil shale. Instructions. Oct. 14 (illegible).

Mr. John T. Murphy, Chief of Field Division, G.L.O., Santa Fe, New Mexico.

Sir: By office decisions of October 12, 1931, and January 9, 1932, the Hydrocarbon Nos. 184 to 187 inclusive, oil shale placers, were declared null and void to the extent of the interests of all except six parties of record.

* * * *

Very respectfully,

Thomas C. Howell
Commissioner.

10-11-ML

[2043]

PLAINTIFF'S EXHIBIT 188

Memorandum for Mr. Carpenter. June 10, 1936

Subject: Oil shale placer locations in Western Colorado and eastern Utah.

* * * *

An effort has been made by the Department to eliminate oil shale claims believed to be invalid but the desired result has not been attained. The grounds of the proceedings in two outstanding cases were charges of failure on the part of the locators to perform the annual assessment work required by law, but the decisions of the Supreme Court have been adverse to the contentions of the Government. Wilbur vs. Krushnic et al (280 U.S. 306), rendered January 6, 1930, and Virginia-Colorado Development Company vs. Ickes (295 U.S. 639).

[2044] Notwithstanding these decisions, however, as to the effect of failure to perform annual assessment work, other grounds for proceedings may be available in other cases. Proof that a valid discovery of a mineral has not been made, or that the claims are fraudulent, or that they have been abandoned would be sufficient grounds for a finding that these locations are invalid. However, it is probable that the Department in the past has experienced difficulty in obtaining sufficient evidence to support charges on any of these grounds.

* * * *

[2046]

PLAINTIFF'S EXHIBIT 189

Only the Commissioner of the General Land Office United States Department of the Interior General Land Office Washington Mch 1, 1937

In reply please refer to 1376265 "N" WST Evanston 07975-08080-08121 Placer claims. Status.

The Director, Geological Survey.

My dear Dr. Mendenhall: Reference is had to the letter of the Administrative Geologist dated January 30, 1937, relative to drilling for oil and gas which had been done on certain subdivisions that were included in oil and gas prospecting permits Evanston 07975, 08080 and 08121, now canceled. The subdivisions involved are, according to previous correspondence, SE ¼ NE ¼ Sec.

23, SW ¼ NW ¼ Sec. 24, SE ¼ SE ¼, SW ¼ SW¼ Sec. 26, NE ¼ NE ¼ Sec. 35, T. 21 N., R. 117 W., 6th P. M., Wyoming

Since the date of the letter addressed to the oil and gas supervisor at Casper, Wyoming, November 6, 1933 (copy of which was sent to you), the United States Supreme Court, in the case of Ickes v. Virginia-Colorado Development Corporation (295 U. S. 639), has rendered a [2047] decision to the effect that a mining claim does not become subject to forfeiture to the Government merely for failure on the part of a claimant to perform the annual assessment work required under the United States mining laws but that such failure merely renders the claim subject to relocation by other parties.

As the charge made against the various claims was merely that the annual assessment work had not been performed nor resumed, the adverse proceedings, which were instituted by the Government against the claims, were vacated and the lands involved must therefore be regarded as still covered by such claims.

Very respectfully,

(Sgd) Fred W. Johnson
Commissioner.

[2048]

PLAINTIFF'S EXHIBIT 190

United States Department of the Interior Geological Survey Washington Jan 30 1937 8

The Commissioner, General Land Office.

By letter dated October 16, 1933, there was transmitted to your office a copy of a letter dated September 12, 1933, from the oil and gas supervisor, Casper, Wyoming, requesting a report as to the status of oil placer claims involving land on which certain wells cited in the supervisor's letter are located. The wells, drilled prior to the mineral leasing act of February 25, 1920, are located

within canceled oil and gas prospecting permits Evanston 07975, 08080 and 08121, Fossil field, Lincoln County, Wyoming.

By letter of November 6, 1933, addressed to the supervisor, your reference 1375265 "N" WST, your office reported that some of the placer claims had been declared null and void in their entirety, while others had been declared null and void as to part interests with proceedings still pending against remainder. It was understood that final action as to cancellation of the placer claims was dependent on a decision then pending before the U. S. Supreme Court.

Since the wells involved are either flowing water or are standing with water near the surface with showings of oil and gas in evidence, the Geological Survey is desirous of proceeding with plugging operations if there are no valid placer claims to interfere. Because the Public Works funds allotted to the Geological Survey for plugging wells will not be available for use after the end of this fiscal year, the plugging work should commence at an early date.

You are requested to inform the Geological Survey as expeditiously as possible the status of the placer claims involving those tracts upon which the wells listed in the supervisor's letter of September 12, 1933, are located. Since the supervisor's letter will be found in your files, the descriptions of the tracts are not repeated here.

For the Director,

Julian D. Sears
Administrative Geologist.

Received
Feb 1 1937
G.L.O.

Answered 3/1/37
NST-N

[2049]

PLAINTIFF'S EXHIBIT 191

United States Senate Committee on the Judiciary June 9, 1941

see reply 7/25/41 file with Proposed 77th Cong. re Miners Claims on the Public Domain

[Stamps: Interior Dept. Received Jun. 12 1941 Secretary's Mail Center To Solicitor Interior Dept. Received Jun. 12 1941 Solicitor]

Interior Dept. Received Jun 11 1941 Office of The Secretary

Hon. Harold L. Ickes Secretary of the Interior Interior Department Washington, D.C.

My dear Mr. Secretary: I am enclosing a letter I have received from Mr. W. S. McCarthy, Secretary of the Mountain States Development Company, Union Pacific Building, Salt Lake City, Utah, concerning the advisability of enacting legislation similar to the provisions of H. R. 6560 of the 3rd Session of the 76th Congress, a bill relating to placer mining claims. (Rec. 1-139-76th Cong re this bill) I am enclosing a copy of this bill for your information.

I will greatly appreciate your viewpoint on this matter, and would particularly like to know any new developments that may have arisen since the beginning of the present Congress.

Kindly return the enclosed letter and bill with your reply.

Yours very truly,

Abe Murdock

m:b

[2050]

PLAINTIFF'S EXHIBIT 192

The Secretary of the Inter Washington Jul 25 1947

File Copy
Surname:

Hon. Abe Murdock, United States Senate.

Solicitor's Off.
Speck
Wolfsohn
Edelstein
Fisher
Chapman
Dempsey
(illegible)

My dear Senator Murdock: I regret that the pressure of legislative matters has caused delay in replying to your letter of June 9 with reference to H. R. 6560 of the 76th Congress.

With your letter was enclosed a letter addressed to you from the Secretary of the Mountain States Development Company which urges that you gave your support to H. R. 6560, a bill relating to placer mining claims. That bill was introduced at the request of the Department for the purpose of obtaining authority to clear up certain claims which have been pending since the passage of the Mineral Leasing Act. These claims were saved by section 37 of the act and because of a deficiency in the law it has not been possible to require that they be either developed or abandoned. The bill was passed by the House but because of amendments by the Senate Public Lands Committee which would have made the measure of questionable value it failed of enactment.

I have thought that the proposed investigation under Senator O'Mahoney's resolution, S. Res. 53, would provide a good opportunity to present this matter and to obtain a full consideration of its merits, and pending the commencement of the investigation I have not submitted the bill to the present Congress. However, if you should desire to introduce the measure, I shall designate a member of my staff to explain its purposes and provisions in full to you. Copies of the bill, as introduced and as subsequently amended, and a copy of the Department's report on the original bill are enclosed. In accordance with

your request, your correspondent's letter is returned herewith.

Sincerely yours,

(Sgd.) Harold L. Ickes
Secretary of the Interior.

Mailed by W.K.M.
Enclosure 316635.

[2051]

PLAINTIFF'S EXHIBIT 193

Department of the Interior Office of the Secretary
Washington Nov 10 1941

Solicitor
Duncan
Matthew
Edelstein
Appd.Sol.Off.

Mr. C. S. Scholer, 818 Lumber Exchange Building, Minneapolis, Minnesota.

My dear Mr. Scholer:

From Solicitor
Nov 7 1941
To GLO

* * * *

[2052]

Without making any assumption as to the validity of your claims, it may be stated that the law is settled that the Government cannot forfeit a mining claim for failure to perform annual assessment work as such failure can only be taken advantage of by a relocator (Wilbur v. Krushnic, 280 U. S. 306). The Secretary of the Interior has authority to determine that a claim is invalid for lack of discovery, for fraud, or other defect, or that it is subject to cancelation for abandonment, but his attempt to forfeit a claim for default in assessment work is without authority (Ickes v. Development Corp., 295 U. S. 639).

* * * *

[2053]

Sincerely yours,

(Sgd.) Oscar L. Chapman
Assistant Secretary.
(Stamp)

[2054]

PLAINITFF'S EXHIBIT 194

The Secretary of the Interior Washington May 21, 1943

1943382 "N" [Stamp] Interior Dept. Received Apr 29 1943 First Assistant Secretary

To Secretary 12/21/42 (Words illegible)

File Copy
Surname:
G.L.O.

Bradshaw
Barash
Altizer
Havell
Wolfsohn
Johnson
Duncan
Hilton
Edelstein
(illegible)
Wright
(illegible)
Chapman
F.
(illegible)
Fortas
(illegible)

My dear Mr. Vice President: There is enclosed herewith a draft of proposed legislation relating to placer mining claims on lands valuable for phosphate, sodium, potassium, oil, oil shale and gas.

The mining claims that would be affected by the proposed legislation were located prior to February 25, 1920, the date of enactment of the mineral leasing law which excepts from its operation "valid claims existent at the time of passage of (the) Act and thereafter maintained in compliance with the laws under which initiated." Since that date lands valuable for the minerals named have not been subject to location under the general mining laws but could be acquired only by lease.

Notwithstanding that for the past 22 years no location could be made on account of these minerals, many thousands of such claims are still of record in county recorder offices within the public land states. Many of these claims may have been abandoned by the locators but their putative existence constitutes a cloud on the title and hampers this Department in its administration of the public land laws particularly in the matter of issuing grazing and mineral leases and permits.

Neither this office nor any other Federal office has a record of mining locations because the law does not require that they be filed for record in the land offices. The result is that this Department must either issue mineral

and grazing leases and permits for lands subsequently found to be exclusively held and possessed by others under the mining laws with consequent loss to its lessees and permittees or before such leases or permits are granted cause an investigation to be made to determine whether there are any valid mining claims on the land.

All possible legal means of solving the difficulty have been tried. Conceiving that the mineral leasing act conferred such authority upon him, the Secretary of the Interior challenged in Departmental proceedings the validity of thousands of these claims. After full hearings the claims were declared void because of default in assessment work.

In Wilbur v. Krushnic, 280 U. S. 306 (1930) and Ickes v. Virginia-Colorado Development Corp., 295 U. S. 639 (1935), the Supreme Court held that the proceedings exceeded the authority of the Secretary and were therefore without effect.

Thus the claimants of these locations are in a decidedly more favorable position than is any other class of public land claimants including the owners of other types of mining claims. They are permitted to enjoy valuable

[Stamps: Interior Dept. Secretary's Mail Center Dec 21 1942 To Solicitor; Interior Dept. Received Apr 29 1943 Asst. Sec'y's Office; Interior Dept. Received Apr 29 1943 Under Secretary; Interior Dept. May 20 1943 Secretary's Mail Center; (Words illegible) May 20 1943 Secretary, Mailed by (illegible)]

Copy for Secretary's Office

estates [2055] in land without incurring any obligation whatever. Although the law requires that they perform annually assessment work of the value of $100 on each claim, they are subject to no penalty if they fail to do so. As a rule they have no taxes to pay but are permitted to enjoy estates in land without assuming any liability.

It is essential to the proper administration of the lands that some satisfactory disposition be made of the large number of invalid and speculative claims which exist on the public domain. The situation is one that calls for legislative action and the attached draft of a

bill has been prepared for that reason. The provisions of the bill would afford an effective means of determining the status of the public lands affected and would enable this Department to administer the lands subject to lease or other form of appropriation free from interference with the rights of the owners of valid mining claims. They would permit of the satisfactory disposal of numerous claims which probably have been abandoned but which under present practice can only be disposed of at great expense, if at all, because of the difficulty and often of the impossibility of locating the owners of the claims. Sections 2 and 3 of the proposed bill would provide for a termination of mining claims under the conditions stated. Upon such termination the land in the claims would become subject to disposal under applicable public land laws, and the minerals in the land for which the claims were located would become subject to disposition only under the provisions of the mineral leasing laws.

A similar proposal was made by me to the 76th Congress. This proposal resulted in the introduction of the bill H. R. 6560, which was passed by the House of Representatives on July 6, 1939.

In view of the considerations set out herein, I recommend that the proposed bill be submitted to the Senate for its consideration.

I am informed by the Director of the Bureau of the Budget that there is no objection to the submission of this bill.

Sincerely yours,

(Sgd.) Harold L. Ickes
Secretary of the Interior.

Hon. Henry A. Wallace,
President of the Senate.
Enclosure 2829144.

Identical Letter Sent To Speaker of the House

[2056]

PLAINTIFF'S EXHIBIT 195

1957279 "L" PRS 7439

File Copy
Surname:
(G.L.O.)
Barach
Howell
Johnson
Ryan
Kavanagh
Edelstein
Appd.Sol.Off.

United States Department of the Interior Office of the Secretary Washington June 17 1943

Hon. Edwin C. Johnson, United States Senate.

My dear Senator Johnson: The Secretary has referred to me for consideration and reply to your letter of May 25, transmitting a letter from Mr. Hugh Burdick of De Beque, Colorado, concerning the grazing of stock on unpatented oil shale placer claims. 2-139 Oil Shale

The Department has been studying for some time the problem which Mr. Burdick complains of and is now awaiting a comprehensive report of field investigation which is being made in the same general area in an analogous case. The regional field examiner of the General Land Office is being directed to have Mr. Burdick interviewed during the investigation which that office is making. The Grazing Service has also made an extensive investigation of the matter. When a full report of the investigation is received, such appropriate action will be taken to protect the interests of the United States and the ranch owners as the facts and the law warrant.

Many of the unpatented oil shale claims to which your constituent refers are obviously being held speculatively, not for bona fide development of the mineral but for the income derived from leasing the surface for grazing. This has resulted in substantial interference with the administration of the Taylor Grazing Act. Departmental proceedings instituted some years ago challenging the validity of thousands of oil shale claims did not prove fruitful.

To alleviate the peculiar situation which has developed from these oil shale claims, upon recommendation of this Department, S. 1139 has been introduced in the United States Senate. This bill would require the oil shale claim-

ants to record their claims in the General Land Office within a specified time, and to perform annually the assessment work contemplated by Section 2324, Revised Statutes, under penalty of forfeiture for failure to comply. 2-147 Admin

Mr. Burdick's letter is returned.

Sincerely yours,

(Sgd.) Oscar L. Chapman
Assistant Secretary.

Enclosure 2829159.
MB:gld 6-12-43

Copy for the Secretary's Office

[Stamps: To Secretary Jun 12 1943 For signature; Interior Department Received Jun 14 1943 Office of and Utilization; Interior Dept. Received Jun 14 1943 Solicitor; From Solicitor Jun 15 1943 For Signature; Mailed by Axtell]

[2057]

PLAINTIFF'S EXHIBIT 196

United States Department of the Interior General Land Office Washington 25, D. C.

1339694 "N" Feb 14 1944 Mr. Warren Paddock, DeBeque, Colorado

File Copy
Surname:
Duckworth
Cummiford
Altizer
Bradshaw
Wolfsohn

My dear Mr. Paddock:

* * * *

Shale King Nos. 6, 7, 8, 9,	covering	sec.	25, T. 5 S., R. 101 W.,
Massive,	" SW¼	"	23, T. 5 S., R. 101 W.,
Massive Nos. 1, 2,	" E½	"	26, T. 5 S., R. 101 W.,
Massive No. 3,	" NE¼	"	35, T. 5 S., R. 101 W.,
Massive Nos. 4, 5, 6, 7,	" all	"	36, T. 5 S., R. 101 W.

Adverse proceedings against the claims were ordered May 13, 1930 on the charge that the assessment work

had not been done on the claims during certain assessment years. The parties failed to file answers denying the charge, and by our decision of August 16, 1930 the claims were declared null and void. That decision, however, was rendered ineffective by reason of the decisions of the United States Supreme Court in the cases of Wilbur V. Krushnic (280 U.S. 306), and Ickes v. Virginia-Colorado Development Corporation (295 U.S. 639). In the latter case the Court said that although the Secretary of the Interior conceivably might declare unpatented mining locations null and void for various reasons, a failure of the owner to perform the annual labor does not render the claims subject to forfeiture by the United States.

This office has received information from a number of persons in your locality that various individuals alleging ownership of oil shale locations have been leasing the claims for the grazing of stock. An investigation of this reported practice has been made and the matter is under consideration with a view to taking appropriate action.

Official Copy

Very truly yours,

Fred W. Johnson
Commissioner.

2-9-dms
Copy for General Land Office Files

[2058]

PLAINTIFF'S EXHIBIT 197

Denver, Col. June 15, 1944. Mr. Louis Hoffman Division "N" General Land Office Washington 25, D.C.

Dear Sir: Will you advise me of the present status of the Contest11855, against the Big Pete Nos. 3,6,7, et al oils hale placer mining claims against which Contest was directed by "N" UEG, of May 16, 1928, 1300099.

The records of the Denver Land Office show that the claims have been declared null, void as to the parties

served with the notice of Contest except as to the Daisey, Ivy and Lucile. [N/Chap ans'd 7-5-44 A.J.M. "N"]

I am making separate requests on two separate groups or cases and will get you to favor me a reply on separate sheets.

Thanking you, I am very truly,

W. Porter Nelson
607 California Bldg
Denver 2, Colo

(Stamp)

[2059]

PLAINTIFF'S EXHIBIT 198

1300099 "N" The General Land Office

File Copy
Surname:
Meyer
(illegible)
Altizer
Bradshaw

United States Department of the Interior General Land Office Washington Jul 5 - 1944

Mr. W. Porter Nelson, 607 California Building, Denver 2, Colorado.

My dear Mr. Nelson: I have your letter of June 15 asking for the present status of the contest No. 11855 against the Big Pete Nos. 3, 6, 7, and other oil shale placer mining claims.

The records of this office show that by our letter of May 16, 1928, to the Register at Denver, Colorado, adverse proceedings were directed against the Big Pete Nos. 3, 6, 7, Davey Nos. 1, 3, 5, 6, 7, 8, Ivy No. 1, Lucile Nos. 1 to 7, and other oil shale placer claims, charging that valid assessment work had not been performed upon or for the benefit of any of the claims for any of the assessment years commencing July 1, 1921, and ending July 1, 1927. The charge was amended November 16, 1928, to allege that valid assessment work was not performed upon or for the benefit of any of the claims for any of the years ending July 1, 1921 to 1928 inclusive.

On June 25, 1930, new adverse proceedings were directed charging:

"That annual assessment work was not performed upon each or any one of the Big Pete Nos. 3, 6, 7, Buffalo Nos. 1 to 12 inclusive, Colorado Nos. 1 to 8 inclusive, Columbine Nos. 1 to 8 inclusive, Con Creek Nos. 1 to 8 inclusive, Davey Nos. 1, 3, 5 to 8 inclusive, Denver Nos. 1 to 8 inclusive, 62, 69 to 72 inclusive, 113, 114, 116, Dere Nos. 1, 2, 7, Ivy No. 1, Little Joe Nos. 1, 2, 3, Lucile Nos. 1 to 7 inclusive, Texas Nos. 1, 2, 2, 4, 6, oil shale placers for the year ending July 1, 1929, and that work has not been resumed."

The Register was directed to notify the claimants that by reason of the default of said assessment work the United States has taken possession of the lands within the claims for its own uses and purposes.

Notices of the charge were issued under contest No. 11855 by the Register and served on W. C. Browning, C. L. Sloan, J. H. Ginnet and the General Shales Corporation, reported to be the owners of the claims. As no answer was filed within the time allowed, the Davey Nos. 1, 3, 5, 6, 7, 8, the Ivy No. 1, the Big Pete Nos. 3, 6, 7, and other oil shale placer locations were declared null and void and the case closed by our [2060] letters of June 24, 1931, to the Register. By our letter of July 7, 1931, to the Register the Lucile Nos. 1 to 7 oil shale placer locations were also declared null and void and the case closed.

However, in the case of the Shale Oil Company (55 I.D. 287) the Department held, in view of the decision of the Supreme Court in the case of The Virginia-Colorado Development Corporation (295 U.S. 639) that the adverse proceedings in that case, based on charges of failure to do annual assessment work must be held as without authority of law and void.

Very truly yours,

(sgn) Fred W. Johnson
Commissioner.

7/3/sas

[2061]

PLAINTIFF'S EXHIBIT 199

In Reply Refer To: 1069641 "N"

Address Only The Commissioner of The General Land Office

United States Department of the Interior General Land Office Washington Jul 4 - 1944

File Copy
Surname:
Meyer
Brooks
Altizer
Bradshaw

Mr. W. Porter Nelson, 607 California Building, Denver 2, Colorado.

My dear Mr. Nelson: I have your letter of June 15 asking for the present status of the contest No. 12478 directed against the Sid Nos. 1 to 22 oil shale placer locations by our letter No. 1069641 of July 16, 1930.

The letter referred to directed new adverse proceedings against the locations mentioned on the charge "That annual assessment work to the value of $100 was not performed upon each or any one of the Sid Nos. 1 to 22 inclusive, oil shale placers for the year ending July 1, 1930, and that work has not been since resumed." The letter also directed service of notice of the charge on E. B. McNair and George W. Habberset, the record title holders of the locations.

On September 16, 1930, answer was filed in the Denver Land Office by E. B. McNair in which no denial is made of the allegations contained in the charge, but contestee contended that the Sid Nos. 1 to 22 claims having been located prior to the leasing act of February 25, 1920, constituted valid claims existent February 25, 1920, and maintained in compliance with the laws under which they were initiated, etc.

By our letter of June 24, 1931, to the Register it was stated that as the answer merely objected to the charge without denying the allegations therein, the contestees were allowed 30 days from notice in which to file a proper answer or appeal to the Secretary of the Interior and that if no action was taken within the time allowed the locations would be declared null and void without fur-

ther notice. On August 25, 1931, the Register reported no action taken and transmitted evidence of service consisting of registry return receipt signed by E. B. McNair July 24, 1931. Accordingly by our letter of October 12, 1931, to the Register the locations were declared null and void as to the interest therein of E. B. McNair and the Register was directed to serve new notice of the decision of July 16, 1930, on George W. Habberset. The records show that such notice was served October 24, 1931, and in his letter of December 1, 1931, the Register reported that no answer was filed by Habberset within the time allowed. Accordingly by our letter of January 7, 1932, to the Register it was held that "The failure of the contestee to file answer denying the charge is taken as an admission by him of the truth thereof, in view of which the Sid Nos. 1 to 22, inclusive, oil shale placer locations are declared null and void in their entirety and the United States has taken possession of the lands within the claims for its own uses and purposes." The case was also closed by that letter.

Official Copy Copy for General Land Office Files

[2062] However, in the case of the Shale Oil Company (55 I.D. 287) the Department held, in view of the decision of the Supreme Court in the case of The Virginia-Colorado Development Corporation 295 U.S. 639) that the adverse proceedings in that case, based on charges of failure to do annual assessment work must be held as without authority of law and void.

Very truly yours,

(sgn) Fred W. Johnson
Commissioner.

7/3/sas

[2063]

PLAINTIFF'S EXHIBIT 200

Address Only The Commissioner of The General Land Office (Stamp)

United States Department of the Interior General Land Office Washington 25, D.C. Jul 26 1945

In Reply Refer To: 2054653 "N" (Stamp)
2-139 Oil Shale

Mr. John V. Dougherty, 622 White Avenue, Grand Junction, Colorado.

My dear Mr. Dougherty: Reference is had to your letter of June 18 concerning lands in secs. 17, 18 and 19, T. 7 S., R. 100 W., 6 P.M., for which you hold a grazing permit.

Our records show that the S ½ sec. 17, all of secs. 18 and 19 are covered by Ute Rock Nos. 1 to 6 and Nos. 23, 24, 25, and 26, oil shale placer mining claims located prior to the oil shale leasing act of February 25, 1920, (41 Stat. 437).

[filed in 10-3 general] Departmental decision of March 3, 1932 affirmed our decision of December 2, 1931, which declared these claims null and void for failure to perform the annual assessment work during a certain year. The decisions, however, were made ineffective by reason of the decisions of the United States Supreme Court in the cases of Wilbur v. Krushnic (280 U.S. 306), and Ickes v. Virginia-Colorado Development Corporation (295 U.S. 639). In the latter case the Court said that although the Secretary of the Interior conceivably might declare unpatented mining locations null and void for various reasons, a failure of the owner to perform the annual labor does not render the claims subject to forfeiture by the United States.

This office has received information from a number of persons in your locality that various individuals alleging ownership of oil shale locations have been leasing the claims for the grazing of stock. The question of what action shall be taken in the matter is now under consid-

eration. A copy of "Our Last Land Frontiers" will be sent you under separate cover. Dec 1-7-30-45 + 6-7 Colorado

Very truly yours,

(Signed) Fred W. Johnson
Commissioner.

Received Division of Information 1945 Jul 30 PM 12 00 Director's Office

ECD:mgl 7/9

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* * * *

[2065]

PLAINTIFF'S EXHIBIT 202

3 x R. 1 x C.P.D. United States Department of the Interior General Land Office Washington Jun 8 1932

In Reply Please Refer To: 1365365 "N" RLW

Oil Shale. R. Contest 12183. Locations null and void. Case closed.

Register, Denver, Colorado.

Sir: By office letter "N" of April 26, 1932, promulgating departmental decision of March 3, 1932, the Ute Rock Nos. 1 to 43 inclusive, 45 to 50 inclusive, and Pine Nos. 1 to 15 inclusive, oil shale placers, T. 7 S., Rs. 99, 100 and 101 W., 6th P. M., Colorado, were declared null and void in their entirety, service having been had on the parties of record upon the charge directed by the Chief of Field Division on July 3, 1931:

"The annual assessment work to the value of $100 was not performed upon the said oil shale placers for the year ending July 1, 1931, and that work has not since been resumed."

The names of two additional parties interested in the claims having been furnished by the Chief of [2066] Field Division, notices of the charge were served on

such parties on January 30 and March 28, 1932, and in your letter of May 12, 1932, you stated that no answers were filed by the parties within the time allowed.

The failures of the contestees to file answers denying the charge are taken as admissions by them of the truth thereof, in view of which the Ute Rock Nos. 1 to 43 inclusive, 45 to 50 inclusive, and Pine Nos. 1 to 15 inclusive, oil shale placers, are declared null and void in their entirety and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed.

Advise the parties hereof by ordinary mail.

Very respectfully,

(sg) C. C. Moore
Commissioner.

6-3-ML

[2067]

PLAINTIFF'S EXHIBIT 203

United States Department of the Interior Grazing Service Office of the Director Salt Lake City 9 Box 659 December 3, 1945.

Hilton
Creech
Moyer
Billig
Wassemer
Edelstein
F. S. Cohen
Gardner

In Reply Refer To: [Stamp: Interior Dept. Secretary's Mail Center Dec-7 1945 To Solicitor] Address only The Director Grazing Service

Memorandum for the Secretary.

Orderly administration of the grazing districts established since June 28, 1934, under the provisions of the Taylor [2-139 Oil Shale] Grazing Act, comprising large areas of the public domain in western Colorado, eastern Utah and southern Wyoming, has been affected seriously by the practice of numerous unpatented oil shale mining claimants leasing the located lands to stockmen for grazing purposes. The administrative difficulties resulting

from the practice have long been a serious problem. A solution has been diligently sought by the Grazing Service. The unsatisfactory situation persists and becomes more acute from year to year.

The mining locations in question were initiated under the placer mining laws prior to the enactment of the Mineral Leasing Law of 1920, and little or no annual assessment work or other mining work has since been performed upon the claims and cannot be required by the Government under existing law as announced in decisions of the Supreme Court of the United States in the cases of Wilbur v. Krushnic, 280 U. S. 306 (1930), and Ickes v. Virginia-Colorado Development Corporation, 295 U. S. 639 (1935),

[Stamps: Interior Dept Dec 7 - 1945 Solicitor; From Solicitor Dec 12 1945 For Signature]

* * * *

[2069] Following a conference in the Solicitor's Office, attended by members of the staff and representatives of the General Land Office and the Grazing Service, it was agreed that in the circumstances it would be advisable that the Department establish the administrative practice of not recognizing any rights in the mining locators to the surface resources, except such as may be required for actual mining purposes and that permits or licenses to utilize the grazing resources be issued under the Taylor Act and the Federal Range Code to qualified livestock owners, with the inclusion in the present form of grazing permits or licenses of suitable provisions to that effect. It is therefore recommended that the present forms used in the issuance of grazing permits or licenses be amended to include the following or similar language:

"This permit or license applies to all Federal range within the area described, including the surface of unpatented mining locations or claims not needed by the locator for mining purposes or in extracting and removing the mineral deposits therein. It is understood that the permittee or licensee will exercise due care not to disturb or damage any mining improvements thereon and that he will be responsible for any damage to such min-

ing improvements resulting from the grazing of his livestock upon any such claims under this permit or license."

If you approve of this procedure, it is believed that it will be of material help in the administration of the large areas in grazing districts included in numerous unpatented mining claims. In the event the suggested procedure would in any case result in litigation between the mining locators and the grazing permittees, steps may be taken through intervention on behalf of the Government, to secure a judicial determination of the respective rights of the Government and all the parties concerned, and of other important questions which should be settled as early as practicable.

(Sgd.) C. L. Forsling
Director of Grazing.

Approved: Jan -3 1946

(Sgd.) Oscar L. Chapman
Assistant Secretary.

[2070]

PLAINTIFF'S EXHIBIT 204

The Secretary of the Interior

Washington 25, D. C. Mar 21 1946
To Secretary 8/15/46 For signature

2088300 "N" P.R.S. 1479 2-139
General

(Word illegible)
Hoffman
Bradshaw
Wolfsohn
Johnson
Edelstein
Appl. Sol. Off.
Doty

[Stamps: Interior Dept. Secretary's Mail Center Mar 18 1946 To Solicitor; Interior Dept. Mar 18 1946 Solicitor; From Solicitor Mar 19 1946 For Signature; Interior Dept. Mar 19 1946 Asst. Secretary]

My dear Senator Myers: I have received your letter of March 6, with which you transmitted one from Mrs. H. C. Emmett concerning her interest in certain oil shale mining claims.

The records of this office show that based on adverse proceedings, the Oil Dome Nos. 1 to 12, inclusive, oil shale placer mining claims, mentioned by Mrs. Emmett as owned by the Western Shale Oil Company, were declared null and void on November 10, 1931. However, in the case of the Oil Shale Company (55 I.D. 287, 290), decided June 24, 1935, the Department recalled and vacated its action in the Virginia-Colorado Development Corporation case (53 I.D. 666), and overruled its action in other cases, including this one.

* * * *

Sincerely yours,

(Sgd.) Oscar L. Chapman
Acting Secretary of the Interior.

Hon. Francis J. Myers,
United States Senate.

Mailed by Roady
Enclosure 96
3-14-kg

[2071]

PLAINTIFF'S EXHIBIT 205

Department of the Interior General Land Office Washington Nov 10 1931

In Reply Refer To 1412210 "N" RLW

Oil shale. R. contest 6257. Locations null and void. Case closed.

Register, Salt Lake City, Utah.

Sir: By office letter "N" of June 30, 1931, adverse proceedings were directed against the Oil Dome Nos. 1, 2, 3, 4, 5, 6 Sec. 1, Nos. 7, 8, 9, 10, 11 and 12 Sec. 12, T. 11 S., R. 25 E., S. L. M., oil shale placers, upon the charge:

"That annual assessment work to the value of $100 was not performed upon each or any one of the Oil Dome Nos. 1 to 12 inclusive, oil shale placers for the year ending July 1, 1929, and that work had not been re-

sumed on said claims May 6, 1930, when challenges to the validity thereof were posted thereon on behalf of the United States."

Notices of charge issued by you and were served on two of three claimants reported as having interests in the claims on July 20, 1931, and in your letter received in this office October 12, 1931, you stated that no answers were filed by the parties served within the time allowed. [2072] The failures of the contestees served with notices to file answers denying the charge are taken as admissions by them of the truth thereof, in view of which the Oil Dome Nos. 1 to 12 inclusive, oil shale placers are declared null and void to the extent of the interests of the parties served and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed to the extent of the interests of the parties served.

Advise the parties hereof by ordinary mail.

Very respectfully,

(sg) Thos. C. Howell
Acting Commissioner.

11-7-ML

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* * * *

[2075]

PLAINTIFF'S EXHIBIT 207

United States Department of the Interior General Land Office Washington Mar 27 1946

2086165 "N"

Messrs. Tupper, Smith and Holmes, Raso Building, Grand Junction, Colorado.

The General Land Office
File Copy
Surname:
Cummiford
Duckworth
Bradshaw
Howell

Gentlemen: Your letter of January 5 has been transmitted to this office by the Register of the District Land Office at Denver, for answer.

On October 21, 1937, patent No. 1092929, issued to Vernon G. Huntley for the W ½ SW ¼ sec. 4; E ½ SE ¼ sec. 5; NW ¼, SW ¼ NE ¼, W ½ SE ¼; NE ¼ SW ¼ sec. 9; T. 6 S., R. 100 W., 6th P.M., with the reservation to the United States of the coal and other minerals in the land, together with the right to prospect for, mine, and remove the same. On April 25, 1939, patent No. 1102395, issued to Hugh Campbell for the SW ¼, SW ¼ SE ¼, sec. 5; NE ¼ NW ¼, NE ¼, NE ¼ SE ¼ sec. 8; W ½ SW ¼, SE ¼ SW ¼, sec. 9; NE ¼ NW ¼, sec. 16; T. 6 S., R. 100 W., 6th P.M., with the reservation to the United States of the coal and other minerals in the land, together with the right to prospect for, mine and remove the same, under the Act of December 29, 1916, (39 Stat., 862). The holder of a location, made either before or after the initiation of the homestead entries, has the right to use so much of the surface of the lands as may be needed in his mining operations provided the holder complies with the requirements of section 9 of the Act with respect to the protection of the crops and improvements of the surface owner. The issuance of the patents divested the United State of title to the lands, and in order for the holder of the claims to which you refer, to successfully assert title to the lands within the locations, the holder would have to establish, through court proceedings, that prior to the initiation of the homestead entries, the locations had been perfected by valid discoveries of oil shale or some other mineral subject to location, and would have to obtain a court decree that the patentees or successors were holding in trust for him, the title to the lands within the boundaries of the locations.

Patents issued on homestead entries with the reservation of the oil and gas under the Act of July 17, 1944, (38 Stat., 509), prevent the subsequent issuance by this office of patents upon a mining claim, located for any mineral upon the land. The rights of a mining claimant, if any, must be determined by the courts. Leases for oil and gas upon such patented lands may be issued under the Act of February 25, 1920, (41 Stat., 437). Patent No. 895390, issued February 6, 1923, for the

SW ¼ SE ¼, sec. 17; NW ¼ NE ¼, sec. 20, T. 6 S., R. 99 W., 6th P.M., with the reservation of the oil and gas under the Act of July 17, 1944.

Official Copy
Copy for General Land Office Files

[2076] The Phenol group of mining claims, including the numbers mentioned in your letter, were declared null and void by this office on August 26, 1931, as the result of Contest No. 12036. However, the decision of August 26 was based on a charge that the required annual assessment work had not been done on each, or any of the claims for the year ending July 1, 1929, and had not been resumed. With respect to certain other oil shale claims, on January 6, 1930, (Wilbur v. United States, 280 U.S. 306), and June 3, 1935, (Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639), the United States Supreme Court held in effect that the failure to do the assessment work could not be made the basis of a contest by the government, and that the failure did not work a forfeiture of the claims to the government, but only rendered them subject to loss through relocation by some other persons, if the work was not commenced or resumed before such relocation.

Very truly yours,

Fred W. Johnson
Commissioner.

CC: Reg.
3-6-zmb

* * * *

[2078]

PLAINTIFF'S EXHIBIT 209

1943043 "DL:MG"

File Copy
Surname:
BLM
Gilles
Wassem
Leo Huck
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Excep'd. Sol. Off.

United States Department of the Interior Office of the Secretary Washington Aug 29 1950

My dear Mr. Whatley: This has reference to your petition and brief, dated April 26, 1950, requesting a refund of the amount of $157.52 paid by you under protest in connection with grazing privileges granted to you for the 1948 grazing season in the Roan Creek Unit, Colorado Grazing District No. 7. You appear to own or control certain unpatented oil shale mining claims in the area, and the principal issue raised by you is whether as such owner you have the right to use the surface of these claims for grazing purposes. 2-139 Oil Shale

As you undoubtedly are aware, numerous owners and holders of such claims have leased them for many years for grazing purposes. This practice has seriously affected the proper and orderly administration of the grazing districts in western Colorado. The problem has been administratively considered by this Department on a number of occasions, and the legal implications thereof have also been carefully considered.

The mining claims are situated within the oil shale area in Colorado, and were located prior to the enactment of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 30 U.S.C. sec. 181) which provides for the leasing of lands containing oil shale and other minerals. This Department has held in Freeman v. Summers 52 L.D. 201 (1927) that oil shale deposits constitute valuable mineral deposits under the mining laws.

In view of Wilbur v. Krushnic 280 U.S. 306 (1930) and Ickes v. Virginia Colorado Development Company 259 U.S. 639 (1935), the failure to perform assessment work does not render mining claims invalid but subjects them merely to loss through relocation. As oil shale locations may not be made since the enactment of the Min-

eral Leasing Act, there is therefore no actual obligation on the part of the locator to perform assessment work to prevent relocation.

It is the view of this Department that a mining locator acquires merely a possessory interest in his claim; that he may use so much of the surface as is reasonably necessary in the legitimate operation of mining and in furtherance thereof, and that he may not use the surface of his claim for purposes not related to mining, as for example, the grazing of livestock thereon. Of course there could be no objection to a mining locator grazing on his claim livestock used directly in his mining operations and solely for that purpose. +6.2 General +6-6 Colorado

[Stamps: 3 Interior Dept. Secretary's Mail Center Aug-8 1950 Received OLU; (Words illegible) LO 45 Aug 8 1950 Office of (words illegible); Interior Dept. Secretary's Mail Center Aug-9 1950 To Solicitor; Interior Dept. Aug 9-1950 Solicitor; From Solicitor Aug 9 1950 For Signature; Interior Dept. Secretary's Mail Center Aug 10 1950 Received Doty; 9 Interior Dept. Aug 10 1950 Secretary; 14 Assistant Aug 10 1950 Secretary]

Copy for the Secretary's Office

* * * *

[2080] You state that the Mineral Leasing Act, supra, and the Taylor Grazing Act (43 U.S.C. 315 et seq.) are subject to all valid and existing rights initiated prior to their passage. We do not here imply that the oil shale mining claims are invalid. We simply point out that in our opinion the claims may not be utilized for purposes foreign to mining. Until the claims ripen to patent, the land covered thereby is the property of the United States and, as stated in the Rizzinelli case, supra, subject to the locator's legitimate use for mining purposes, the Government continues to be the owner of the land and is interested in conserving its value."

We conclude, therefore, that lands covered by oil shale mining claims within an established grazing district are subject, until the issuance of patent, to administration

by this Department, and that license fees for the grazing use of the surface thereof may properly be levied by the Bureau of Land Management in accordance with the provisions of the Federal Range Code.

* * * *

You allude to the "directive" of January 3, 1946 approved by the Assistant Secretary. I assume you refer to the instruction to the grazing officials to include in all grazing permits and licenses affecting unpatented mining locations or claims a provision that the permittee or licensee will exercise due care not to damage or disturb mining improvements thereon. You request that it be "reconsidered and * * * either enforced or withdrawn and rescinded or a new directive issued which can and will be enforced against all alike without fear or favor * * *." This Department has consistently endeavored to enforce the provisions of this "directive" in all cases [2081] and against all persons equally. Since it is our position that the surface of unpatented mining claims are subject to administration for grazing purposes by this Department, there is no need for rescinding the "directive".

Sincerely yours,

(sgd) Dale E. Doty
Assistant Secretary of the Interior

Mr. Barney L. Whatley
DeBeque, Colorado

MGILLER:rpg
8-3-50

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* * * *

[2083]

PLAINTIFF'S EXHIBIT 210

March 30, 1951

My dear Mr. Whatley: First, permit me to express my regrets for the long delay in replying to your letter of October 9, 1950, in which you comment on Assistant Secretary Doty's letter to you of August 29 concerning the right of an owner of an unpatented mining claim to use the surface for the grazing of livestock.

* * * *

[2084] Accordingly, in all the circumstances and, at the same time, with a deep appreciation of the sincerity of your argument, I am compelled to affirm the position taken by Assistant Secretary Doty.

Sincerely yours,

(Sgd.) Oscar L. Chapman
Secretary of the Interior

Mr. Barney L. Whatley
DeBeque, Colorado

HPower:pl

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[2087]

PLAINTIFF'S EXHIBIT 211

* * * *

[2090] United States Department of the Interior Office of the Secretary Washington 25, D.C. Aug 29 1963 (Seal)

Dear Senator Anderson:

* * * *

[2092] During the period 1925 to 1931, in order to resolve problems of title ownership, more than 1,000 con-

tests were initiated by the Department against the validity of oil shale placer mining claims in Western Colorado. Probably some ninety percent of the complaints served in these contests alleged invalidity for failure to perform annual assessment work on the claims. The remaining ten percent alleged fraud, dummy locations, lack of discovery, abandonments, etc. Subsequently, the Supreme Court held that the charge of failure to perform assessment work could not be the basis for the Department to declare unpatented oil shale mining claims invalid. Wilbur v. Krushnic, 280 U.S. 306 (1930); Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639 (1935).

* * * *

[2093] Following the 1935 decision of the Supreme Court in the case of Ickes v. Development Corporation, the Department dismissed those contests which were based solely on the charge of lack of assessment work, and in the Shale Oil Company case of June 24, 1935 (55 I.D. 287), stated ". . . the decision of the Commissioner . . . in the instant case, must be held as without authority of law and void . . . . . the instructions of June 17, 1930, are hereby recalled and vacated. . . . other Departmental decisions in conflict with the decision are hereby overruled." However, vacating of this charge, of itself, created no presumption as to the validity of any oil shale claim. The principal issues then remaining were discovery of a valuable deposit of oil shales, fraud, dummy locations, and abandonment.

The files contained numerous letters, memoranda, and instructions showing that the position of the Department, as stated in the Shale Oil Company case, was unchanged until about 1958. During this time all prior adverse decisions, based on assessment work, were ignored, and many patents were issued without any question being raised as to the finality of the Shale Oil decision in cancelling all prior decisions which were based on assessment work alone. In the last decade, beginning in 1950,

a total of 92 mineral patents were issued embracing 92,000 acres of oil shale lands.

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[2096] Sincerely yours,

(sgd) John A. Carver, Jr.
Assistant Secretary of the Interior

Hon. Clinton P. Anderson
United States Senate
Washington 25, D. C.

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[2099]

PLAINTIFF'S EXHIBIT 212

Aug 20 1959 Air Mail Memorandum To: Associate Solicitor, Division of Public Lands From: Regional Solicitor Subject: Effect of decisions of the Department and of the Commissioner, General Land Office, declaring oil shale placer claims null and void based solely on the charge of failure to do assessment work File 1,606,652 11-4

• • • •

[2100] did the Department overrule, vacate and vitiate all of the previous final decisions of the Commissioner of the Land Office and the Department which declared oil shale claims null and void based solely on the charge of failure to perform assessment work, even though parties to the decisions declaring claims null and void failed to appeal judicially or administratively. In this connection we desire to refer to Departmental decisions Lillie M. Kelly (July 25, 1923, 49 L.D. 659), State of New Mexico, Robert M. Wilson, Lessee, v. Robert S. Shelton and John T. Williams (December 14, 1932, 54 I.D. 112), and Charles Perkins (On Rehearing) (October 30, 1923, 50 L.D. 172). All of those decisions tend to support the rule that final decisions of the Department or its sub-

ordinate offices shall be given the effect of res adjudicata, particularly where affected parties fail to appeal.

Notwithstanding the Supreme Court decision in Ickes v. Virginia-Colorado Development Corporation, supra, and the Departmental decision of The Shale Oil Company, supra, would it be improper for this office to advance the rule that persons named in final decisions of the General Land Office and of the Department who failed to exhaust administrative remedies or who failed to seek remedy in the courts lost their rights to claims administratively declared null and void on the basis of failure to perform assessment work?

Since the answer to this memorandum will have a bearing on the way we proceed in the pre-hearing conference in Contest 147 as well as proposed contests relating to many other oil shale placer claims, we will appreciate an answer by letter or teletype by August 27, 1959.

Bryan L. Kepford
For the Regional Solicitor
Denver Region

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[2103]

PLAINTIFF'S EXHIBIT 215

Dec-3 1959 Memorandum To: Regional Solicitor, Denver Region From: Associate Solicitor, Division of Public Lands Subject: Oil shale locations declared null and void solely for failure to perform the assessment work

* * * *

You raise the question whether under the doctrine of res judicata, those claimants who failed to appeal from the Commissioner's decisions or resort to the courts where a departmental decision was concerned, now are foreclosed from asserting any rights under their locations notwithstanding later Supreme Court decisions (Wilbur v. Krushnic, 280 U. S. 306 and Ickes v. Development

Corporation, 295 U. S. 639), holding that the Government was not concerned in a claim-holder's failure to do the assessment work and that it could not declare a forfeiture of a claim because of such failure.

In view of the Supreme Court decisions mentioned, the Department in its decision of June 24, 1935, in the Shale Oil Company case (55 I. D. 287) held that in that case the Commissioner's decision was without authority of law and void; recalled and vacated certain cited departmental decisions and the departmental instructions of June 17, 1930 (53 I. D. 131); and overruled "other departmental decisions in conflict with this decision." Thus in effect the decision of June 24, 1935, recalled and vacated all departmental decisions declaring oil shale placer claims null and void solely for failure of the claim owner to do the assessment work, thus leaving the claims as if they never had been contested.

* * * *

[2104]

C. R. Bradshaw
Associate Solicitor
Division of Public Lands

Copy to: Secretary's Office

* * * *

[2105]

PLAINTIFF'S EXHIBIT 216

In Reply Refer To: 5.22a-2 C-028751

United States Department of the Interior Bureau of Land Management Colorado State Office 339 New Custom House P. O. Box 1018 Denver 1, Colorado August 3, 1960 (Seal)

3/15/61 4/15/61 8/8/61

Memorandum To: Land Office Manager From: Lands and Minerals Officer Subject: C-028751, Maude B. Farnum, et al Application for Patent SW, NW, NE, and SE Oil Shale Placer Mining Claims

The mineral report and a relinquishment filed by the applicants are transmitted for further action by your office. The second copy of the relinquishment will be recorded in the office of the Clerk and Recorder, Garfield County, Colorado.

The relinquishment should be accepted and the tract relinquished should be excluded from patent. This tract is described as the E ½ E ½ NE ¼, sec. 27, T. 7 S., R. 98 W., 6th P.M., being part of the Northeast Placer Mining Claim.

All else being regular, the Northwest, Southwest and Southeast Placer Mining Claims and that portion of the Northeast Placer Mining Claim not relinquished should proceed to patent.

J. Elliott Hall
Lands and Minerals Officer

Enclosures

To

(Words
illegible)

[2106] PLAINTIFF'S EXHIBIT 217

Sep 18 1961 Memorandum To: Associate Solicitor, Public Lands From: Regional Solicitor Subject: Oil shale locations declared null and void solely for failure to perform assessment work.

Reference is made to our memorandum of July 6, 1961, subject as above.

As we have indicated to you orally in recent telephone conversations, the State Director, Bureau of Land Management, Denver, is anxious to file complaints or amended complaints in several oil shale contests. We are aware that one of these contests involves directly the question which is discussed in the July 6, 1961 memorandum. A member of the staff of this office will participate in a discussion of the possible filing of this contest today. At this time we will request the State Director to withhold action on the filing of this contest for a period of one week.

It would be appreciated if you could find it possible to answer our memorandum of July 6 within this period so that we could appropriately advise the State Director.

Bryan L. Kepford
For the Regional Solicitor
Denver Region

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* * * *

[2112]

PLAINTIFF'S EXHIBIT 218

Copy Washington DC 9-22-61 Regl Solicitor USDI Denver Colo

(Word illegible) of July 6 and September 16 re oil shale locations declared void solely for failure to do assessment work. You are authorized to advise the Colorado State Director to dismiss pending patent applications on this ground and on the legal basis outlined in your July 6 memorandum. Care should be exercised though to insure that the record in the old contests declaring the claims null and void disclose that they were properly conducted and terminated under the rules of practice so that the State Director's action may be reasonably free from successful challenge on the grounds that they lacked due process because of procedural defects. Memorandum follows. (In reply refer to: G-61-2043.10A.)

T J Cavanaugh Assoc Solicitor Div of Public Lands

[2113]

PLAINTIFF'S EXHIBIT 219

United States Department of the Interior Office of the Solicitor Denver Regional Office Room 21, Building 53 Denver Federal Center Denver 25, Colorado Sep 26 1961

Received	Mailed & Date
State Dir	
1 I & M	
R & R	
2 IO	
Eng.	
Action	
Comments	
Filing	

Memorandum To: State Director, Bureau of Land Management, Denver, Colorado State Director, Bureau of Land Management, Cheyenne, Wyoming From: Regional Solicitor Subject: Oil shale —Effect of old decisions declaring claims null and void for failure to do assessment work

Enclosed are copies of our memorandum of July 6, 1961, to the Associate Solicitor, Division of Public Lands, and of the teletype from the Associate Solicitor in response thereto dated September 22, 1961.

You will note that the Associate Solicitor has authorized us to advise the Colorado State Director to dismiss pending patent applications on the basis of the subject decisions. The effect of this is that in each instance where a patent application is filed on an oil shale location, if in reviewing the file the Land Office determines that the claims were subject to contest on a charge of failure to do assessment work, that proper service was had in said contest, and that a decision was entered in said contest declaring the claims null and void, the Land Office in these circumstances may issue a decision denying the patent application on the basis of the old contest decision. This procedure should avoid a multitude of oil shale contests.

Bryan L. Kepford
For the Regional Solicitor
Denver Region

Enclosure

* * * *

Clerk's Note: Plaintiff's Exhibits No. 225 - Letter to McEniry from Commissioner 1/28/18; No. 226 - Letter to Attorney General from First Asst Secy 2/2/18; No. 227 - Letter to Herwick from Lenenberger 10/19/18; No. 228 - Deposition of Herwick 10/22/18 - appear in separate exhibit book

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* * * *

[2140]

PLAINTIFF'S EXHIBIT 229

C. F. Leuenberger, Special Agent, GLO. C. L. Duer, Mineral Examiner,GLO. Favorable report, Oyler Oil Shale Placers Nos.1 to 4 incl. Glenwood Springs L.D. 10-621582 "FS" SHM.

22192 315-25 Postoffice Bldg. Denver, Colorado. November 12, 1918

Honorable Commissioner, General Land Office, Washington, D.C.

Sir:- By your letter of January 28, 1918, above file, you order investigation regarding operations of certain parties upon lands within the limits of the Naval Oil Shale Reserve No.1,Colorado, created by Executive Order December 6, 1916, and embracing lands in Townships 5 and 6 South, Ranges 94 and 95 West, 6th P.M. Glenwood Springs Land District.

With your letter you inclose copy of a letter dated December 26, 1917, written by Mr. H. F. May, Special Assistant to the Attorney General, with offices at San Francisco. Mr. May's letter calls attention to the fact that Messrs. Reed and Doyle had made certain [2141] placer locations on oil shale within this Naval Oil Shale Reserve. With your letter you also transmit copy of promulgating order of withdrawal dated December 6, 1916, Naval Oil Shale Reserve No.1, Colorado.

As a result of our investigation just completed, we find in this Naval Reserve the following locations:

22190 Lignum Vitae Oil Shale Placer No. 6, by Joseph Bellis et al,

Oyler Oil Shale Placers 1 to 4 inclusive, by J. L. Herwick, et al.,

22193 La Paz Oil Shale Placers 1 to 14 inclusive, by Shoup, Doyle, et al.,

22194 Sheridan Oil Shale Placers 1 to 21 inclusive, by Verner Z. Reed, James Doyle, et al.,

Homestead Entry No.011121, by James A. Neilson;

Squatter's claim,by one Fred Hurlburt.

Report will be submitted on each of these claims or group of claims separately, and we will now proceed to make report on:

Oyler Oil Shale Placers 1 to 4 Inclusive. 44627 86 [2142] The descriptions of these Oyler Oil Shale Placers numbered 1 to 4 inclusive, are as follows:

No. 1: NE ¼ Section 10,
No. 2: W ½ NW ¼, N ½ SW ¼, Section 11;
No. 3: E ½ NW ¼, W ½ NE ¼, Section 11;
No. 4: E ½ NE ¼ Section 11, W ½ NW ¼ Section 12, All in T.6 S., R.95 W., 6th P.M. Parachute Mining District, Garfield County, Colorado.

The original locations were made September 25, 1916, and recorded on October 3, 1916, in Book 77, pages 311 and 312. The original locators were: Ida O. Herwick, Guy Herwick, Oren Herwick, William Herwick, Jennie Herwick, Fred Herwick, James Doyle and J. L. Herwick. The Herwicks are members of the family of which J. L. Herwick is the head. James Doyle is a mining man, heavily interested om oil shales and a friend and former associate of J. L. Herwick. Mr. Herwick lives at Grand Valley and is a highly respected citizen. Much of the development work which has been done on the Sheridan and La Paz placers inside the Naval Oil Shale Reserve has been done under contract by J. L. Herwick and his sons. We questioned Mr. Herwick relative to the [2143] matter of discovery prior to location and he said an opening was made on each of the four Oyler placers, samples taken and the oil content of the shale proven by the application of heat.

In Book 103, page 227 of the Garfield County records, Mr. J. L. Herwick makes affidavit of labor and money

expended on each of the four Oyler claims amounting to $100.00 per claim for the year 1917.

We rode over the ground on horseback and found an open cut on each one of the Oyler claims 15x10 ft., 10 ft. face. We had a sample of shale from each one of these cuts and by the application of heat determined that they were oil bearing. These placer claims are situated from one quarter of a mile to one mile from the shale outcrop but the surface is cut by numerous gulches and small streams which expose the shale beds, and it is along these small creeks that the discovery and assessment work on these claims has been done. If mining of oil shale for shipment were undertaken, these open cuts would be good points of beginning and therefore, may be consistently considered as development work. As no reduction plants have as yet been erected in the vicinity of these Oyler placers, [2144] no shale has as yet been shipped for commercial purposes.

On November 9, 1917, a seven-eighths (7/8) interest in Oyler Oil Shale Placers numbered 1 to 4 inclusive, was transferred by mining deed to J. L. Herwick by the other locators; the consideration named in the records of Garfield County, in Book 5, page 220, is stated as $5.00 &c. We questioned Mr. J. L. Herwick concerning this transfer and he explained that the locations were originally made in good faith but that the performance of the assessment work fell to him, altho he was assisted by members of his family who were also some of the original locators. We refer to his affidavit herewith in which he also states that if he had not pushed the work, he is of the opinion that it would not have been done. He conceived the idea that in case of death it would be better to have a legal title in one head, and as his family would still have their legal interests in his estate, he got them to quitclaim to him.

As to locator James Doyle, he was the only locator outside of the Herwick family. Mr. Herwick states that Doyle seemed to have about all he could attend to in looking after the development work of the Sheridan and [2145] La Paz groups of oil shale claims, in which Doyle is also interested, and failed to assist him with labor or

money in doing the assessment work on the Oyler placers, and apparently not wanting to advertise Doyle out of the Oyler claims, he approached him to ascertain if he desired to hold his interest by doing his share of the assessment work or if he preferred to deed his one-eighth (⅛) interest to Mr. Herwick. Mr. Doyle decided he would make quit claim deed to Mr. Herwick and severed his connection with the Oyler placers. In an interview with Mr. Doyle relative to the Oyler placers, he made statements which corroborated those of Mr. Herwick.

We believe the foregoing statements cover all the points of inquiry contained in your letter of January 28, 1918. The preliminary requirements regarding discovery, location, notices, as well as subsequent assessment work, have been complied with. Of course, discovery of oil in these shales is not the same as would be the discovery of free oil for the reason that the oil is obtained by a process of distillation which consists of the application of heat and a condensation of the oil vapors into liquid oil by conducting the pipes leading from the retort thru [2146] cold water. Nevertheless, it must be admitted that the chief value of these shales is in the oil that they can be made to produce. In fact, as appears from your letter of June 29, 1916 (621582 "N" JYH) addressed to the Register and Receiver, U. S. Land Office, Glenwood Springs. Colorado, you advise that the Director of the U. S. Geological Survey, by his letter of May 23, 1916, classified the lands embraced in this group of placers, together with other lands, as valuable for petroleum and nitrogen. According to the Act of Congress approved February 11, 1897 (29 L.D.526):

"Any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

The Naval Oil Shale Reserve No.1, Colorado No.1, was created by Executive Order dated December 6, 1916, and therefore is subsequent to the date of discovery and location of this particular group of oil shale placers. Therefore, the withdrawal of this reserve would not be a bar

to the further development work of these claims if prosecuted in good faith.

We were informed by a representative of the U. S. Geological Survey that it was well known that bona fide [2147] oil shale placer locations existed within the confines of this shale reserve at the time it was created but that it was placed wherever it least interfered with bona fide locations. While at Grand Valley we witnessed the retorting of oil from shales by Prof. Dean E. Winchester of the U. S. Geological Survey. These oil shale deposits occur in horizontal strata, and in Bulletin 691-B, U.S. G.S. on page 52, Mr. Winchester gives a table showing a section of the oil shale bearing formation at the forks of Parachute Creek, 10 miles north of Grand Valley, Colorado, in about Section 36, T.5 S., R.96 W. Said table is as follows:

		Ft.	In.
Shale (estimated average 15 gallons)		125	0
Shale (" " 30 ")		75	0
Shale,rich,hard (sample 193, 5 feet near middle of bed; 42 gallons	—	25	0
Shale (average nearly as good as sample 192; probably 30 gallons	—	30	0
Covered and lean shale	—	86	0
Shale (estimated 30 gallons)	—	45	0
Shale (as good or better than sample 192)	—	4	6
Shale,sandy, lean	—	6	0
Shale (estimated 25 gallons)	—	4	0
Shale (nearly as good as sample 192)	—	5	0
Shale, medium	—	15	0
Shale, hard,blue (like sample 192)	—	3	0
Shale, medium	—	9	0
Shale,hard,blue (like sample 192)	—	2	0
Shale,medium	—	9	0
Shale,hard,blue (sample 192) 36 gal.)	—	2	6

[2148]

Interval, probably 40 percent shale in beds 3 feet or more thick which will test 25 gallons or more to ton	—	175	0
Shale (like sample 191)	—	2	0
Shale, medium rich	—	5	6

		Ft.	In.
Shale, (like sample 191)	—	3	0
Shale, medium rich	—	11	0
Shale, (like sample 191)	—	2	0
Shale, lean	—	6	6
Shale,hard,blue (sample 191; 19 gal)	—	5	4
Shale,sandy,yellow	—	5	0
Shale, (estimated25 gallons)	—	18	0
Shale,slightly less rich than 190	—	12	0
Shale,hard (sample 190; 18 gallons)	—	6	4
Sandstone	—	—	3
		847	11

Said Section 36 corners with Section 6, T.6 S., R.95 W., which is one of the most westerly sections within the Naval Reserve. Considering the tabulation given, in connection with the outcrops along the eastern boundary lines of the Reserve, it is comparatively safe to assume that the formation underneath this group of placers is approximately like unto that shown in the tabulation.

Mr. Winchester, who is now, and has for years been making experimental tests of the oil shales of Colorado, [2149] Utah and Wyoming, in Bulletin 641-F, U.S.G.S., page 153, gives the results of his tests of shale samples taken from seven different seams outcropping on the east side of this Naval Reserve; the table referred to is quoted as follows:

Location Sec.Tp.Rg.	Thick-ness	Oil Gal. per ton	Gas (Cu.ft) per short ton	Ammonium sulphate
6 - 6- 94	10′ 0″	40.6	1916	4.3 lbs.
6 - 6- 94	4′ 3″	28.	4294	7.3 "
22- 6- 95	0′ 8″	24.5	1198	4.4 "
22- 6- 95	0′ 8″	35	3500	8.7 "
22- 6- 95	8′ 0″	20.7	—	—
22- 6- 95	13′ 0″	15.4	1443	3.2
22- 6- 95	15′ 0″	11.2	1198	4.0

The oil in the seams tested, runs from about 11 to 40 gallons per ton of shale besides the free gas and ammonium sulphate.

From our investigation we are of the opinion that the Oyler placers are bona fide locations and that the requirements of the mining laws have been met up to the present time, and we would recommend that no adverse action be taken regarding these claims but that when application is filed for patent, a further examination be made to determine whether or nor the requirements of the mining laws have been fulfilled.

[2150] The location of these claims is shown on the map of Naval Oil Shale Reserve No.1, Colorado, which accompanies our report on the La Pez group of oil shale placer claims.

The affidavit of J. L. Herwick is attached hereto.

Very respectfully,

Special Agent, G.L.O.
Mineral Examiner, G.L.O.

(Trans.11/12/18) MT

Clerk's Note: Plaintiff's Exhibits No. 230 - Letter to Commissioner from Charles Duer 11/7/18; No. 231 - Letter to Commissioner from Charles Duer 11/9/18; No. 232 - Letter to Commissioner from Chief, Denver Field Div. 11/29/18 - appear in separate exhibit book.

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* * * *

[2206]

PLAINTIFF'S EXHIBIT 236

Department of the Interior Washington 1186985
Address Only The Secretary of the Interior July 17, 1925.

Referred To
Mr/Beach and Capt Harr
For: Recommendation

P.R.C.	Action
Reply	Conference
Report	Information

The Commissioner of the General Land Office. L & Capt Harr [Stamps: Received Jul 18 1925 G.L.O.; Received Jul 18 1925 G.L.O.]

Dear Mr. Commissioner: I inclose herewith copy of letter from the Acting Secretary of the Navy, wherein he requests that this Department undertake an investigation of claims in Naval Oil Shale Reserves 1 and 3, Colorado, and Naval Oil Shale Reserve No. 2, Utah, in order to clear up and dispose of invalid claims and definitely fix the status of lands within the reserves.

The Department is of the opinion that the public interest warrants and requires such procedure, and you will take such steps, through your Field Service, as may be necessary to initiate and carry through such an investigation, with any necessary incidental proceedings.

The Navy will no doubt be glad to cooperate in every way with this investigation and should be advised, through the Department, of any action taken affecting the reserves.

Sincerely yours,

E. C. Finney
Acting Secretary

Inclosure 1794

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* * * *

[2213]

PLAINTIFF'S EXHIBIT 242

Department of the Interior General Land Office 323 Post Office Bldg., P. O. Box 509, Denver, Colorado, February 28, 1929. P-11

Denver Land District Oyler Oil Shale Placer Claims Nos. 1 to 4, incl., Adverse report Warren R Sholes Asst Mining Engineer

The Commissioner, General Land Office, Washington, D. C. Approved Ralph S. Kelley Chief Field Division 3-4-27

Sir: On April 27, 1927 I was assigned for field investigation and report the following oil shale placer claims in Garfield County, Colorado:

Oyler Nos. 1 to 4, inclusive, T. 6 S., R. 95 W., 6th P. M.

* * * *

[2248] Officer,Benj. F. L. Heron, interviewed Charles S. Cook at Santa Monica, California, and secured an affidavit from him. This affidavit is attached as Exhibit H. In it Mr. Cook gives a general statement regarding his work, supports the statement of Mr. Hansen as to road and trail indicating that it was all done in the 1920, and that since that time no other work or trail work has been done for the claims; that in May 1922 and two other years, which I assume, are 1923 and 1925, he had charge of assessment work above the escarpment on the claims; that he put in wedge-shaped holes in a number of cases, digging double holes on one claim for the benefit of two. He made no attempt to identify the holes dug. He gave the names of the men who assisted him, as far as he could remember, and the wages paid.

His statement confirms the opinion that the road and trail are applicable to the assessment year 1920 only, and that assessment holes were the only form of work done for the years following.

The following table gives a summary of this assessment work as near as could be estimated:

Confidential Not for Public Inspection

[2249]

Oyler No. 1

Assessment yr. ending		
7/1/21	Trail and road	$ 600.40
7/1/22	Probably open cut No. 11	52.80
7/1/23	Open cuts 12 and 13	346.25
7/1/24	----------	—
7/1/25	Open cut No. 14	—
7/1/26	One-fourth trenches on Oyler No. 2	—
7/1/27	Open cut 11 A	100.00
7/1/28	Open cut 11 B	100.00
	Total —	$1199.45

Oyler No. 2

7/1/21	Trail and road	600.40
7/1/22		—
7/1/23	Open cut 5 probably	64.20
7/1/24		—
7/1/25		—
7/1/26	One-fourth trench system	40.00
7/1/27	Open cut 5 A	100.00
7/1/28	Open cut 5 B	100.00
	Total —	$904.60

Oyler No. 3

7/1/21	Trail and road	$ 600.40
7/1/22	Open cut 9 probably	183.80
7/1/23	Open cut 1 and one-half open cut 3	319.58
7/1/24	One-half open cut 7 and one-half open cut 3	186.27
7/1/25	Open cut 4 and open cut 6	370.05
7/1/26	One-fourth trenches on Oyler No. 2	—
7/1/26	One-half open cut 7	100.00
7/1/28	One-half open cut 1 A	—
	Total —	$1760.10

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[2250]

Oyler No. 4

Assessment yr. ending		
7/1/21	Trail and road	$ 600.40
7/1/22	Open cut 10 probably	89.00
7/1/23	One-half open cut 20	82.30
7/1/24	One/half open cut 17. Open cut 19	224.20
7/1/25	One-half open cut 18; ½ open cut 17	144.40
7/1/26	One-fourth trenches on Oyler No. 2	—
7/1/27	One-half open cut 20	82.30
7/1/28	Open cut 18 A	100.00
	Total —	$1322.60

The totals shown represent the total value of work applicable to each claim. It does not take into account the fact that certain cuts may or may not have been dug for more than one claim inasmuch as this information is lacking. In Cook's affidavit, Exhibit H, he states that during the years he was in charge double holes were dug for the benefit of two claims, but as no identification of

these holes was made with the exception of the year ending July 1, 1925, the holes not otherwise identified must be credited to him where they appear to fit. This has been done as is shown in the preceding tables.

In spite of the above identifications and statements I find assessment work lacking for at least one year on all four claims. On Oyler No. 1 I could find no open cut [2251] or other improvement for the assessment year ending July 1, 1924 or July 1, 1925, and the work for the year ending July 1, 1926 being a trench system on Oyler No. 2, it is of no value toward the development of Oyler No. 1 and even if so, its value of $44 credited to each claim is insufficient.

The assessment work for Oyler No. 2 is lacking for the years ending July 1, 1922, 1924 and 1925, and insufficient for the year ending July 1, 1926.

Oyler No. 3 assessment work is lacking for the years ending July 1, 1926 and 1928, being in the former case the portion of the trench system on Oyler No. 2, and in the latter open cut No. 1 A which, being entirely in earth and gravel, is of no value.

Oyler No. 4 appears to have sufficient work done for every year except the year ending July 1, 1926, which is the trench system on No. 2, above referred to, and is of no value toward the development of this claim.

It might be noted, however, that group work was done. On Oyler No. 3 there were several open cuts of sufficient size for two or three assessment years. These open cuts, however, are of no value toward the development.

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[2252]

* * * *

Recommendations

I recommend that adverse action be taken against each of these claims, charging that the assessment work has not been done each and every year since the date of the leasing act.

The Index Shale Oil Company is a Colorado corporation with offices in the Denham Building, Denver. The

President is Mr. C. W. Church and C. J. Pfusch is Secretary and Treasurer. Their addresses are the same as that of the company. The affairs of the Index Shale Oil Company are now in the hands of the Receiver, same being C. J. Pfusch of the Denham Building, Denver.

Very respectfully,

Warren R. Scholes
Asst. Mining Engineer, G.L.O.

WRS/LP

NK-1-24
LP 25-40

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* * * *

Clerk's Note: Plaintiff's Exhibits No. 244 - Contest No. 12039 6/28/29 and No. 245 - Letter to Index Shale Oil Co. 7/22/31 - appear in separate exhibit book.

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* * * *

[2264]

PLAINTIFF'S EXHIBIT 248

United States Department of the Interior Bureau of Mines Washington 25, D.C. October 11, 1948 LHD [Stamp]

Office of the Director MB 74 49439

Memorandum To: Marion Clawson, Director, Bureau of Land Management. From: Director, Bureau of Mines. Subject: Rights of private parties in lands included in Oil Shale Reserve #1, Rifle, Colorado. See 621583 See Naval Oil Shale Restoration No. 1 Colorado-621583

The Bureau of Mines has been advised that the water works and drill hole (SW "NW" sec. 12) "S" of our Oil Shale Project, Rifle, Colorado, are located on land subject

to certain unpatented placer mining claims, identified as Oyler Nos. 1-4 inclusive, which are said to have been located on September 25, 1916, and filed for record on October 3, 1916. These claims appear to be in sections 10, 11 and 12, T.6S, R 95W, within the Naval Oil Shale Reserve No. 1, established by an unnumbered Presidential Order, dated December 6, 1916, some two months after the asserted location and filing of the subject claims.

We have been informed by one C. R. Jones, Park Lane Hotel, Denver, Colorado, that a company in which he has a one-third interest is being formed to take over and exploit the holdings of the Index Shale Oil Mining Company, that the Index Company holdings include the subject claims and that the new company intends to patent these claims as soon as it has secured the titles. It is Mr. Jones' position that even though no assessment work has been done on the claims, no other party, including the Government, can locate and file an adverse claim by reason of the withdrawal from entry December 6, 1916, and that any development work done by the Government in the meantime can be applied by the claimant for the purpose of patenting the claims.

The Bureau, of course, is not in a position to evaluate the right of the parties in these claims or of Mr. Jones' position with respect thereto. We do believe, however, that if the subject claims are patented the Department may be put to considerable trouble and expense in carrying out the oil shale program at Rifle, and that every reasonable and proper step should be taken to determine the matter favorably to the Government's interest.

* * * *

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* * * *

Clerk's Note: Plaintiff's Exhibit No. 250 - Mineral Entry - appears in separate exhibit book.

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* * * *

[2269]

PLAINTIFF'S EXHIBIT 251

Colorado State Office 357 New Custom House P. O. Box 1018, Denver 1, Colorado 1957 Mar 7 PM 1 04
March 6, 1957

Received Colorado Land Office Denver, Colorado

Memorandum To: Land Office Manager From: Lands and Minerals Officer Subject: C-012327, Pacific Oil Co., Oyler Nos. 1, 2, 3, and 4 Placer Mining Claims - Mineral Entry

The application for patent of the Pacific Oil Company has been investigated and was found to be deficient in several respects, as follows:

1. The claims as now described do not appear to conform to the areas covered by the original locations.
2. Locations of improvements and discoveries on three of the claims, as given in the patent application, could not be checked in the field.

It is recommended that the applicant be allowed thirty days to submit further showings as to these items. If applicant fails to comply accordingly, the application will be rejected.

It is suggested your decision read somewhat as follows:

You are required to show (1) that the land you now claim is the same as was originally located and staked; (2) that the points of discovery and the various improvements listed, as described in the application, are accurately shown by actual bearing and distance from the control points given.

L.O. Mgr.
Status
Accounts
Misc.
Olson Adjuc.
Info.
For Action
No Action
For filing
In dupl.

For the State Supervisor

J. Elliott Hall
Lands Minerals Officer

BLM o58

[2270]

PLAINTIFF'S EXHIBIT 252

(Stamp) United States Department of the Interior Bureau of Mines Region III 1955 Oct 16 AM 10 00 224 New Custom House Denver 2, Colorado October 12, 1959 Co/2327

Office of Regional Director Reply made by L & M 10-15-59 CSI See L & M claims file,

P 15 7077 Bureau of Land Management
1 State Supervisor L C
3 Land Office Dill
2 Lands & Minerals C O
(words illegible)
For Action LM-LO
For Filing LO

Mr. Lowell M. Puckett State Supervisor Colorado State Office Bureau of Land Management 339 New Customhouse Building Denver 2, Colorado

Dear Mr. Puckett: The Bureau of Mines has tentative plans for declaring the Oil Shale Demonstration Plant at Rifle surplus. I have made the statement that the Oyler claims are being brought to patent, and our Washington office has requested me to secure full information concerning the patent proceedings of this claim, including:

1. Its designation in the records of the Bureau of Land Management,
2. Its present status,
3. The steps that have been taken and are being taken to the issuance of a patent,
4. Any other available information concerning the patent proceedings.

For your information, the Oyler claim is directly north of the Bureau of Mines Oil Shale Mine workings.

I will appreciate your furnishing me with the available information requested.

Route		Init'l.	Date
1	Manager (illegible) Mgr. Sec'y		10/11
2	Minerals Lands Expediter Info. Ofcr. Accounts Docket	LN	10/16

Sincerely yours,

J. H. East, Jr.
Regional Director
Region III

BLM 072

Necs. Action 2
Info. Dist.
File Return to

---

* * * *

[2272]

PLAINTIFF'S EXHIBIT 254

In reply refer to: 5.226-2 C-012327 Date: P-17

United States Department of the Interior Bureau of Land Management Colorado State Office 339 New Custom House P. O. Box 1018 Denver 1, Colorado

(Words illegible) PM 2 59 0 Speedmessage Feb 13 1961

To: Director - 5.04a From: State Supervisor, Colorado Subject: Colorado 012327, Pacific Oil Company Oyler Placer Mining Claim Nos. 1 to 4

* * * *

We have investigated the application as to abandonment, dummy locators, and lack of good faith, and find that there is no basis for rejecting the application on any of these grounds.

* * * *

[2273]

PLAINTIFF'S EXHIBIT 255

Mineral Report
Mineral Patent Application
of
Pacific Oil Company
for
Oyler Nos. 1, 2, 3, and 4
Oil Shale Placer Mining Claims
(Title)

Lands Involved
Garfield County, Colorado
Sixth Principal Meridian
T. 6 S., R. 95 W.

April 12, 1961
(Date)

cc: Director, USGS
Washington, D.C.

By W. R. Sholes
Valuation Engineer

Approved
J. Elliott Hall
Lands and Minerals Officer

For Administrative Use Only BLM 085

[2274] Summary and Conclusions:

Previous investigations as reported have shown that all aspects concerning the validity of the subject claims and the patent requirements have been complied with except for the matter of mineral survey and the sufficiency of the work done.

The investigation showed additional work had been done on and for the benefit of Oyler Nos. 1, 2, and 4 sufficient to comply with the requirements of $500 value per claim.

Recommendations:

It is accordingly recommended that the claims be clear-listed for patent.

• • • •

[2277]

PLAINTIFF'S EXHIBIT 256

Colorado State Office 331 New Custom House P.O. Box 1018 Denver 1, Colorado Apr 21 1961

Memorandum To: Regional Director, Region 3 Bureau of Mines From: State Supervisor, Colorado Subject: C-012327, Pacific Oil Company Oyler Placer Mining Claims Status of Patent Proceedings

By your letter of October 12, 1959, you asked us as to the status of the patent proceedings for the Oyler Nos. 1 to 4 Oil Shale Placer Mining Claims and by our reply of October 15, 1959, we advised you as to the status of the claims as of that date.

It appears the applicant, Pacific Oil Company, has met, or will meet in the near future, all requirements for acquiring title to the claims.

(Sgd.) Lowell M. Puckett
State Supervisor

cc: Area Adm., Area 3, 5.20c-2
L&M case file
" reading
SO "
McIntosh/mb

• • • •

[2673-A]

PLAINTIFF'S EXHIBIT 264

[DEFENDANT'S EXHIBIT B]
C-012327

Mineral Entry

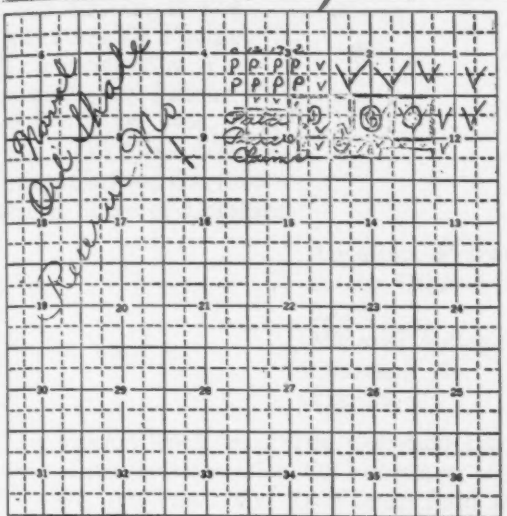
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

BRANCH OF LAND STATUS: Please furnish status of lands described in Case No. C-012327 or on the following described lands in Sections 10 - 11 - 12 - Ogden No 1-2-3-4 - Placer Mining Claims

Twp. 6 South Range 95 West Meridian 6th P. M. State

Other data required

Name of requester Pacific Oil Branch Date



LEGEND

- Outline of area on which status is required
- ✓ Public land in Federal ownership
- Patented land (no minerals reserved)
- Patented land (S. R. Act 12/29/14)
- P Patented land (Act 7/17/14)
- School lands
- Indian allotments

Does posting and survey agree with the lands as described? Yes

Conflicts None

Section 10 Ogden No 1 - Lots 1, 2, 3, 4, E½NE¼ = 320.33 / 160.00 Acres

Section 11 Ogden No 2: N½NW¼ = 80.00, N½SW¼ = 80.00 / 160.00 Acres

Section 11 Ogden No 3: E½NW¼ = 80.00, N½NE¼ = 80.00 / 160.00 Acres

Section 11 Ogden No 4: E½NE¼ = 80.00 / 160.00 Acres
Section 12 Ogden No 1: W½NW¼ = 80.00

Withdrawn by Exc. Order 4-13-30 from lease or other disposal for Naval Oil Shale Reserve No 1 Colo. 105 30/100 out of Sec 31.

Naval Oil Shale Reserve No 1
Colorado No 1 - Executive Order of Dec 6 1916

6/6.65 Acres

Rights-of-way None

Posted in T. B. Vol. No. ____ Page No. ____ Status furnished 10/12/55 Clerk Carl 2782
File with case. Status Clerk will be responsible for its correctness.

McClaine 3-21-62 Recorded

[3021] Secretary of the Interior U. S. Department of the Interior Washington 25, D. C. Director, Bureau of Land Management U. S. Department of the Interior Washington 25, D. C. Colorado Land Office Bureau of Land Management U. S. Department of the Interior Denver, Colorado.

A-29560 Interior Dept. May 31 1963 Solicitor; U. S. Dept. of Interior Received May 31 9 05 AM '63 Immediate Office of the Secretary

In The Matter Of The
Application Of Pacific
Oil Company For A
United States Patent
For The Oyler Nos. 1, 2,
3 and 4 Oil Shale Placer
Mining Claims, Garfield
County, State of Colorado

Appellate Proceeding A-29560
In the Colorado Land Office,
5.22b
Mineral Entry
Colorado No.
012327

Motion To Vacate The Colorado Land Office Manager's Decision Of February 16, 1962, Or, Alternatively, To Vacate Said Decision And Remand For Full Hearing, After Notice Of Matters Of Fact and Law Relied Upon By The Manager and Asserted Against The Applicant

Preliminary Statement

It will be noted that this Motion is directed to the Secretary of the Interior, the Director of the Bureau of Land Management and the Colorado Land Office, Bureau of Land Management. This appeal from the Manager's Decision was directed the Director of the Bureau of Land Management under the number 5.22 b, Mineral Entry Colorado 012327.

We have been unofficially informed that on or about May 8, 1962, the Secretary, in the exercise of his supervisory power, assumed jurisdiction of this appeal and the other appeals from the February 16, 1962, patent rejections and will render Decisions on all of these appeals without an intervening Director's Decision. We have also been informed that all of these appeals have been consolidated in the Secretary's office and that they have been assigned Appellate Proceeding No. A-29560.

Accordingly, we have captioned this case in the above indicated Appellate Proceeding number, but, to avoid any question as to its being filed in the right office, we are filing it with the Secretary, with the Director and with the Colorado Land Office.

Motion

Pacific Oil Company, applicant in the above-listed mineral patent application proceeding, by its undersigned counsel, does hereby move, petition and request (1) that the Decision of the Manager of the Colorado Land Office of February 16, 1962, be vacated or, alternatively (2) that it be vacated and the matters covered thereby be ordered promptly set for a full hearing, after notice of matters of fact and law asserted against applicant, in compliance with the due process clause of the Fifth Amendment to the United States Constitution, the provisions of the Administrative Procedure Act, 5 USC §§ 1001 through 1011, and in particular §§ 1004, 1005, 1006 and 1010, and with the applicable published regulations of the Department of the Interior, for the reasons which follow: BLM 097

[3023] 1. In support of the first motion and for the reasons heretofore stated in appellant's "Statement of Reasons for Appeal" and Supporting Briefs, it is respectfully submitted that the Manager's Decision should be vacated because it is not supported in law or fact by the statements of fact and law therein set forth upon which the patent application was rejected.

2. If the first motion shall be denied, then, in support of the alternative motion, the following reasons are urged:

(a) The Decision of the Manager was rendered without any compliance with the above referred to provisions of the Administrative Procedure Act, without any contest being instituted by the government based upon the grounds set forth in said patent rejection decision or otherwise and without any hearing afforded the patent application to refute the grounds of any such contest as required by the regulations, such as 43 C.F.R., § § 185.87 and 221.51-221.77. To reject the patent application, as was done by the Manager, without any hearing afforded the patent applicant as required by the regulations and by the Administrative Procedure Act deprives the patent applicant of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. BLM 096

[3024] (b) By this reference there is hereby incorporated herein the applicant's "Statement of Reasons for Appeal", together with the Supporting Brief filed therewith, which is incorporated therein by reference. For the various additional reasons stated therein, compliance with the Administrative Procedure Act and the applicable regulations of the Department of the Interior is required to avoid the taking of the applicant's property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(c) At the requested hearing attacking the validity of the applicant's placer mining claims upon the grounds stated in the Manager's Decision, applicant can and hereby offers to introduce evidence in support of and to prove the various facts in support of its position set forth in the applicant's Brief filed in connection with and as a part of its "Statement of Reasons for Appeal" (substantially all of which is contained in the files and records of the Department of the Interior), together with such additional facts, if any, as may be relevant in the light of any evidence introduced in support of any charges made.

(d) So that the Department personnel considering this motion may not be required to consider repetitive statements of reasons for this and similar motions being filed by various patent applicants whose patent applications

were rejected by the Manager on February 16, 1962, now involved in this consolidated proceeding, we here adopt without further [3025] elaboration and additional reasons set forth in the Motion to Vacate and Brief in support thereof being filed by Cleary, Gottlieb, Steen & Hamilton, Washington, D. C., attorneys, in the appeals of Energy Resources Technology Land, Inc., et al., in M.A.C.-016334, et al.

Dated: May 28, 1963.

Respectfully submitted,
Akolt, Shepherd & Dick

By John P. Akolt
Wallis L. Campbell
931 Fourteenth Street
Suite 1300
Denver 2, Colorado

Attorneys for Pacific Oil Company
Appellant

BLM 094

* * * *

[3131] United States Department of the Interior Bureau of Land Management Colorado Land Office Gas & Electric Building 910 - 15th Street Denver 2, Colorado
In Reply Refer To: 5.22b ME C-012327 Feb 16 1962 Certified Mail

Decision

Pacific Oil Company John P. Akolt, Attorney-in-Fact H. J. Vander Veer, Agent Mineral Patent Application 4-2-62

Application Rejected

On September 30, 1955, the Pacific Oil Company, by John P. Akolt, its attorney-in-fact, filed in this office an application for patent to the Oyler Nos. 1 to 4 oil shale placer mining claims located in sections 10, 11, and 12, T. 6 S., R. 95 W., 6th P.M., Garfield County, Colorado and described by Mineral Survey No. 20819. The application was assigned Serial Number Colorado

012327. In support of its application, the applicant filed an abstract of title purporting to show that it had succeeded to all of the interests acquired by the original locators of the claims.

The public records of this office show that all of the claims have been involved in adverse proceedings initiated by the Register of the Denver Land Office pursuant to orders from the Commissioner of the General Land Office. On June 12, 1929, the Commissioner directed adverse proceedings against the claims on the charge of failure to perform annual assessment work. On December 2, 1931, as a result of Contest No. 12039, the Commissioner declared the claims null and void, whereupon the contestee appealed to the Secretary of the Interior. On March 10, 1932, the Commissioner's decision was affirmed.

In view of the principles of finality of administrative action, estoppel by adjudication, and res judicata, the Commissioner's decision must be regarded as conclusive. See Cameron v. United States, 252 U.S. 450 (1920); Reed v. Allen, 286 U.S. 191 (1932); Chicot Co. Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Angel v. Bullington, 330 U.S. 183 (1947); Charles Perkins, 50 L.D. 172 (1923); Charles D. Edmondson et al., 61 I.D. 355 (1954); Garth L. Wilhelm et al., 62 I.D. 27 (1955); Edward Christman, 62 I.D. 127 (1955); Opinion of the Attorney General, 36 Op. Atty. Gen. 541 (1932).

The conclusiveness of the Commissioner's decision was in no way affected by the following decisions and letter: Ickes v. Virginia - Colorado Development Corp., 295 U.S. 639 (1935); The Shale Oil Company, 55 I.D. 287 (1935); Letter of July 29, 1935, from Commissioner of General Land Office to Register, Denver, Colorado, containing instructions to close then pending contests involving the charge of failure to perform assessment work which had not proceeded to final decision. [3132] The contestee and its purported successors in interest have acquiesced in the Commissioner's decision for more than 29 years. During that time, according to those records of this office which pertain to the lands involved, the rights of other parties, including the United States, have intervened.

The application is therefore rejected.

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. If an appeal is taken, there must be strict compliance with the regulations in 43 CFR Part 221 (see enclosed Form 4-1364).

If an appeal is taken, the amount of the filing fee will be computed on the basis of $5.00 for each mining claim included in the appeal. If an appeal covers all claims adversely affected by this decision the total filing fee will be $20.00

If an appeal is taken, the adverse parties to be served are: Orville Mahaffey, Grand Valley, Colorado (grazing lessee)

Director, Naval Petroleum Reserve, Department of the Navy, Room 2 B 8, Yards and Docks Annex, Washington 25, D. C. (Naval Oil Shale Reserve No. 1)

Dale R. Andrus
Land Office Manager

Enclosure

Distribution: Pacific Oil Company John P. Akolt H. J. Vander Veer Orville Mahaffey Director, Naval Petroleum Reserve Director, Bureau of Land Management Regional Solicitor, Denver Region BLM 070

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* * * *

Clerk's Note: Plaintiff's Exhibit No. 283 - letter to the Commissioner from Bradshaw 1/24/31 - appears in separate exhibit book.

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* * * *

[4583]

PLAINTIFF'S EXHIBIT 284

United States Department of the Interior Bureau of Land Management

United States of America Contestant v. John W. Savage Contestee

Contest No. 147 Involving the Placer Mining Claims Known as Hoffman Nos. 11, 12, 13 and 14 Located in T. 5 S., R. 95 W. of the 6th P.M., Garfield County, Colorado

Brief of Contestant
In Support of Proposed
Findings Of Fact And
Conclusions of Law

* * * *

[4597] The Department of the Interior took the position during this period that it was necessary to do assessment work to prevent the Government from taking possession and declaring oil shale claims forfeited because the construction that had been placed on section 37 of the Mineral Leasing Act of 1920. (30 U.S.C. § 193). This section removes deposits of oil and oil shale, among others, from the operation of the mining laws except ". . . as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." It has traditionally been the position of the Department of the Interior under 30 U.S.C. § 28 that the failure to do assessment work merely opened land to relocation and that the Government could not cancel entries for this ground. See P. Wolenberg, 29 L.D. 302 (1899). However, since oil shale lands had been withdrawn from further location by the Mineral Leasing Act, it was contended that the Department stood in the shoes of a relocator and on failure to "maintain" the oil shale claims in accordance with the law, i.e., failure to do assessment work, such claims could be forfeited to the Government. See Emil Krushnic, 52 I.D. 282 (1927). This position was challenged in the case of Wilbur v. U.S. ex rel

Krushnic, 280 U.S. 306 (1930). The Supreme Court there held that failure to do assessment work could not be challenged by the Government [4598] following the resumption of work. Thereafter the Department of the Interior continued to take the position that the failure to do assessment work would constitute cause for the forfeiture of mining claims. See Instructions, 53 I.D. 131 (1930). However, this decision was once again questioned in the courts and was resolved in the Ickes v. Virginia-Colorado Land Development Corporation case, supra, in which the Supreme Court held that the Department of the Interior had no authority to bring such a charge against an oil shale claim. Subsequently, as is indicated in Oil Shale Company, 55 I.D. 287 (1935), all of the decisions declaring claims null and void for failure to do assessment work were closed. (Exhibit R).

• • • •

[4632]

PLAINTIFF'S EXHIBIT 286

B-6 Department of the Interior Washington Sep -6 1917 N

Mr. R. D. George, State Geologist, University of Colorado, Boulder, Colorado.

My dear Sir:

• • • •

[4634] The performance of annual labor upon a mining claim is a matter solely between rival or adverse claimants to the same mineral ground, and goes only to the right of possession, the determination of which is committed to the courts.

• • • •

[4635] Cordially yours,

Alexander T. Vogelsang
First Assistant Secretary.

• • • •

[4637]

PLAINTIFF'S EXHIBIT 288

(Fiscal Year 1928)
Report of the Secretary of the Interior

* * * *

Disposition of a large area of oil shale lands is the subject of pending litigation, involving the construction of a statute. The department has denied the right of applicants to acquire title to these lands, and they have instituted suit to test that ruling. This case is now before the Court of Appeals of the District of Columbia on appeal from a decision of the Supreme Court of the District sustaining the action of the department.

* * * *

[4639]

PLAINTIFF'S EXHIBIT 289

Department of the Interior Washington Oct. 24 1919
Mr. R. R. Hazelwood, Amarillo, Texas.

Dear Mr. Hazelwood:

* * * *

With respect to the performance of annual assessment work on mining claims, I have to advise you that it has always been held that this is a matter between rival or adverse claimants to the same tract of land, and within the jurisdiction of the courts and not of this Department. This is for the reason that the penalty for failure to perform annual assessment work as required by law is relocation, and as you know, the determination of rights between two or more claiming the same piece of land under the mining laws must, under the Revised Statutes, be disposed of through the fil- [4640] ing of adverse claims and suits in the courts.

* * * *

Very truly yours,

Alexander T. Vogelsang
First Assistant Secretary.

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* * * *

[4643]

PLAINTIFF'S EXHIBIT 292

Address Only The Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington Jun 28 1935

In Reply Please Refer to 1606652 "N" CRB Oil Shale records. Instructions.

Register, Salt Lake City, Utah.

Sir: Replying to your letter of June 15, 1935, relative to records in contest cases involving oil shale placers wherein the only charge made relates to failure to perform annual assessment work, you are advised that on June 3, 1935, the Supreme Court held in the case of Harold L. Ickes, Secretary of the Interior, vs. Virginia-Colorado Development Corporation, that the United States is without authority to challenge the validity of an oil shale placer on account of failure to perform the annual assessment work thereon.

However, the adverse proceedings pending in your office were initiated under instructions from the Department and until this office is authorized to do so, which [4644] probably will not be until the mandate of the court in the above case has been received in the Department, action on the pending cases will continue suspended.

As soon as instructions are received from the Department you will be further advised in the matter of the disposal of the cases pending in your office.

Very respectfully,

Fred W. Johnson
Commissioner.

6-26 edt

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Clerk's Note: Plaintiff's Exhibits No. 296 - Description of Claim and No. 297 - Description of Claim - appear in separate exhibit book.

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* * * *

[4713]

PLAINTIFF'S EXHIBIT 306

Name: Altizer, Posey J.

Service Record with Interior:

4/ 1/29- 7/ 2/30	Attorney, General Land Office
7/ 3/30- 6/30/34	Attorney General Land Office (det. to Ofc. of Solicitor from 6/9/33-6/30/34)
7/ 1/34- 6/30/43	Attorney, Office of the Solicitor
7/ 1/43- 9/30/45	Attorney, General Land Office
9/30/45	Retirement

June 6, 1966

[4714]

Name: Barash, Max

Service Record with Interior:

12/11/33- 1/15/34	Assistant Solicitor, Office of the Solicitor
1/16/34- 6/30/34	Assistant Solicitor, General Land Office
7/ 1/34- 6/30/34	Assistant Solicitor, Office of the Solicitor
7/ 1/43-11/19/43	Assistant Solicitor, Geological Survey
11/20/43- 9/17/48	Chief Counsel, Geological Survey
9/17/48	Resigned

June 6, 1966

[4715]

Name: Bradshaw, Clarence R.

Service Record with Interior:

3/ 7/21- 5/ 7/31	Clerk, General Land Office
5/ 8/31-12/31/34	Jr. Adm. Ass't (Law Examiner), General Land Office
1/ 1/35-10/25/38	Law Examiner, General Land Office

10/26/38- 7/11/43	Chief, Minerals Division, General Land Office
7/12/43- 6/13/44	Assistant Solicitor, General Land Office
6/14/44- 8/ 6/45	Attorney, General Land Office
8/ 7/45- 7/27/47	Ass't Chief Counsel, General Land Office
7/28/47-11/11/51	Chf., Br. of Adjudication, General Land Office
11/12/51- 6/30/54	Gen'l Attorney (Ass't Chf. Counsel), Bu. Land Management
7/ 1/54	Mass Transfer to Office of the Solicitor
2/14/56- 8/16/59	Atty-Adv. (Gen.) (Ass't Solicitor). Br. of Minerals, Div. of Public Lands, Office of the Solicitor
8/17/59- 1/ 6/61	Gen'l Attorney (Associate Solicitor), Div. of Public Lands, Office of the Solicitor
1/ 7/61	Retirement

June 6, 1966

[4716]

Name: Duckworth, Earl Clifford

Service Record with Interior:

8/ 1/29- 1/31/34	Jr. Administrative Assistant (Adjudicating Clerk) General Land Office
2/ 1/34- 3/13/44	Law Examiner, General Land Office
3/14/44- 8/17/45	Adjudicator, General Land Office
8/18/45- 4/ 4/54	Attorney, General Land Office
4/ 5/54- 6/30/54	Chief Counsel, Bureau of Land Management
7/ 1/54	Mass transfer to Office of Solicitor
3/ 1/56- 3/31/61	Attorney-Adviser (Gen.) Division of Public Lands, Office of Solicitor
3/31/61	Resignation (Retired 1/31/60. Reemployed Annuitant 2/1/60-3/31/61)

June 6, 1966

[4717]

Name: Duncan, Royal R.

Service Record with Interior:

7/ 1/28- 7/31/33	Attorney, Office of the Solicitor
8/ 1/33- 4/26/34	Land Attorney, Office of Indian Affairs (detailed to Office of Solicitor)
4/27/34-10/31/45	Assistant Solicitor, Office of the Solicitor
10/31/45	Retired

June, 1966

[4718]

Name: Edelstein Harr. M.

Service Record with interior:

5/ 4/36- 8/15/42	Assistant Solicitor, Office of Solictior
8/16/42- 2/13/49	Assistant Solicitor (Chief, Public Lands Division) and Alternate Member, Bd. of Appeals, Office of Solicitor
2/14/49- 8/ 5/50	Assistant Solicitor (Chief, Public Lands Division) and Member, Bd. of Appeals, Office of Solicitor
8/ 6/50- 1/ 1/54	Attorney-Adviser (Assistant Solicitor) Office of Solicitor
1/ 1/54	Resigned

June 6, 1966

* * * *

[4724]

Name: Margold, Nathan R.

Service Record with Interior:

3/23/33- 7/ 9/42	Solicitor for Department of the Interior (In this period, or from 1/16/34 to 11/22/34, Mr. Margold also served as Chairman, Petroleum Administration Board

June 6, 1966

[4725]

Name: Speck, David J.

Service Record with Interior:

1/10/38- 7/31/39	Attorney, Office of the Secretary (Detailed to Office of Solicitor)
8/ 1/39- 9/24/39	Attorney, Office of Solicitor
9/25/39- 8/10/42	Assistant Solicitor, Office of Solicitor
8/10/42	Resigned

June 6, 1966

[4726]

Name: Wasserman, Jacob N.

Service Record with Interior:

10/ 6/41- 6/30/43	Attorney, Office of the Solicitor
7/ 1/43- 8/29/43	Sr. Attorney, General Land Office
8/30/43- 1/28/51	Chief Counsel, General Land Office
1/29/51- 3/30/53	General Attorney (Chief Counsel, Bu. Land Management
3/31/53	Resignation

June 6, 1966

* * * *

[4728] Filed United States District Court Denver, Colorado Jun 17 1966 G. Walter Bowman Clerk By

United States District Court for the District of Colorado

The Oil Shale Corporation, et al., Plaintiffs, vs. Stewart L. Udall, Secretary of the Interior, Defendant.

Civil Action No. 8680 Defendant's Partial Answer to Plaintiff's Interrogatory No. 126

Int. No. 126. Attached hereto are sheets reflecting service and position of those individuals listed in Interrogatory No. 126, who, in fact, acted as attorneys within the Department of the Interior.

Further answer to this interrogatory will be made when additional materials are available.

Attachments.

Lawrence M. Henry
United States Attorney for the
District of Colorado

By David I. Shedroff
Assistant United States Attorney.
Attorneys for Defendant.

[4729]

PLAINTIFF'S EXHIBIT 307

Oscar L. Chapman

Interior Service subsequent to 6-30-30

5- 4-33	to 3-22-46	Assistant Secretary of the Interior
3-23-46	to 12- 1-49	Under Secretary of the Interior
12- 1-49	to 1-20-53	Secretary of the Interior

[4730]

Asa N. Cummiford

Service with Interior subsequent to 6-30-30

8- 1-25	to 12-15-37	Junior Administrative Assistant (Law Examiner) General Land Office
12-16-37	to 3-13-44	Division Reviewer and Law Examiner General Land Office
3-14-44	to 7-14-46	Adjudicator (Division Reviewer) General Land Office
7-15-46	to 4- 1-50	Adjudicator (Division Reviewer) Bureau of Land Management
4- 2-50	to 11-30-52	Adjudicator (Public Lands) Bureau of Land Management

[4731]

Edward C. Finney

Service with Interior subsequent to 6-30-30

3-11-20	to 3-22-33	Solicitor for the Interior Department
3-23-33	to 4-16-33	Special Attorney to the Secretary

[4732]

Urban E. Goener

Service with Interior subsequent to 6-30-30

7- 1-28	to 6-30-32	Assistant Law Examiner General Land Office
7- 1-32	to 9- 4-36 (Death)	Assistant Chief Mineral Division General Land Office

* * * * *

[4734]

Lee Muck

Interior Service subsequent to 6-30-30

8-28-23	to (date not ascertainable from file)	Forest Valuation Engineer U. S. Indian Field Service
5-29-31	to 10-21-37	Assistant Director of Forestry Indian Service
10-22-37	to 5-16-38	Director of Forestry Bureau of Indian Affairs
5-17-38	to 9-25-40	Director of Forests of the Department of the Interior
9-26-40	to 12-20-50	Assistant to the Secretary in Charge of Land Utilization
12-21-50	to 6- 7-53	Director, Division of Land Utilization Office of the Secretary
6- 8-53	to 12-31-55	Staff Assistant (Land Management) Office of Assistant Secretary for Public Land Management

[4735]

Julian D. Sears

Interior service subsequent to 6-30-30

7- 1-28	to 9-30-30	Senior Scientist (Administrative Geologist) (Geological Survey
10- 1-30	to 10-15-36	Special Scientist (Administrative Geologist) Geological Survey
10-16-36	to 6-27-48	Administrative Geologist Geological Survey
6-28-48	to 8-17-50	Geologist Geological Survey
8-18-50	to 6-30-61	Geologist (General) Geological Survey

[4736]

Joel D. Wolfsohn

Service with Interior subsequent to 6-30-30

11-16-37	to 3-19-41	Assistant to the Commissioner General Land Office
3-20-41	to 7-15-46	Assistant Commissioner of the General Land Office
7-16-46	to 2- 6-47	Acting Associate Director Bureau of Land Management
2- 7-47	to 5-31-47	Associate Director Bureau of Land Management
6- 1-47	to 5-31-48	Consultant Office of the Secretary
5-22-50	to 7- 9-52	Special Assistant to the Secretary
7-10-52	to 2-20-53	Assistant Secretary for Public Land Management

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[4741]

PLAINTIFF'S EXHIBIT 308

Deposition of J. Elliott Hall
(Taken by Plaintiff The Oil Shale Corporation)

Pursuant To Notice, the deposition of J. Elliott Hall, called for examination by the plaintiff The Oil Shale Corporation, was taken at Suite 2108, Denver United States National Bank Center, in the City and County of Denver, State of Colorado, beginning at the hour of 9:30 o'clock in the forenoon of the 13th day of June, 1966, before Bertram Naster, a Certified Shorthand Reporter and Notary Public in and for the State of Colorado;

The plaintiff The Oil Shale Corporation appearing by its attorneys, Tweedy, Mosley, Aley & Young, by Mr. John B. Tweedy, and Cleary, Gottlieb, Steen & Hamilton, of New York, New York, and Washington, D. C., by Mr. Richard W. Hulbert and Mr. Donald L. Morgan;

The plaintiffs Umpleby, et al., appearing by their attorneys, Winner, Berge, Martin & Camfield, by Mr. Warren [4742] Martin;

The plaintiffs Napier, et al., appearing by their attorney, Mr. Richard L. Eason;

And the defendant appearing by his attorneys, Mr. David Shedroff, Assistant United States Attorney, and Mr. Robert Mesch, Assistant Regional Solicitor for the U. S. Department of the Interior;

There being also present Mr. Robert W. Bennett, of Colorado State Office of Bureau of Land Management;

It Being Stipulated that all objections as to materiality, relevancy, or competency may be reserved until the time of trial or such time as said deposition or any part thereof is offered for any purpose.

Whereupon, the following proceedings were had:

* * * *

[4743] J. Elliott Hall,

called for examination by the plaintiff The Oil Shale Corporation, being first duly sworn, testified as follows:

EXAMINATION BY MR. HULBERT

Q. Would you state your name for the record, please. A. J. Elliott Hall.

Q. What is your address, sir? A. 3091 South Gilpin, in Denver.

Q. Before we begin, Mr. Hall, just let me say one or two things. I don't know whether you are familiar with what goes on in an examination of this kind. Perhaps you have discussed this with your lawyers. Basically, it consists of my asking you some questions and your stating the answers as best you can. It may be that your lawyer would have objection to a question and there may be, therefore, some discussion. I trust it will not become an argument between counsel. And if that kind of intervention arises, why, just wait for the dust to settle. Mr. Hall, what is your present position? [4744] A. Chief of the Division of Land—let's see, a new title—Division of Lands and Minerals Program Management and Land Office.

Q. That is in the Colorado State Office? A. That's correct.

Q. Bureau of Land Management? A. That's correct.

Q. How long have you held that position, Mr. Hall? A. This is a—I'd say about two or three months. This is a result of a reorganizational change in which the lands and Minerals Section has been consolidated with the Land Office.

Q. Prior to your assuming your present position, what position did you hold? A. Chief of the Lands and Minerals Section in the Colorado State Office.

Q. How long did you hold that position? A. I think from about 1962 to the present time.

Q. Prior to 1962, Mr. Hall, what was your position? A. I was Land Office Manager for slightly less than one year, and prior to that I was chief of the Lands and Minerals Section in the Colorado State Office, to 1954.

Q. You say to 1954. Do you mean from 1954? A. From '54 till that.

Q. Manager of what land office, Mr. Hall? [4745] A. In Colorado, land office.

* * * *

[4768] Q. Did the mineral examiners submit written reports? A. Yes.

Q. Were they required to submit reports in writing? A. Yes.

Q. It was one of their duties as mineral examiner to submit such report? A. That's correct.

Q. Who was that report submitted to? A. That was submitted to the—to me, at the time I was Lands and Minerals officer.

Q. And what did you do with it? A. This varied, depending upon the situation.

Q. Let me be a little more precise. Did you read it? A. Surely.

Q. Do you recall any occasion on which a mineral examiner's report was submitted to you where you did not read it? A. No. I had to rely, of course, to a great extent upon the mining engineers and—

Q. I didn't mean whether you second-guessed him. I meant, did you read his report? Do you recall any occasion in which a report was submitted to you that you did not read? A. I would normally read it, yes.

Q. Was it one of your functions to approve it or disapprove it? [4769] A. Yes.

Q. If you approved it, how did you indicate approval? A. By signature.

Q. Do you recall any occasion where you approved a mineral examiner's report without reading it? A. No, I don't think so.

Q. Do you recall any occasion on which you indicated approval of a report which you thought should not be approved? A. No, I don't.

Q. Mr. Hall, what standards governed your approval of a report? A. Following the Manual, of course, attempting to determine whether the factual information in the report was adequate and would support the recommendations or conclusions of the mining engineer.

Q. In short, your standard was whether the facts stated in the report appeared to warrant the conclusion expressed by the examiner— A. That's correct.

Q. —in terms of the proper criteria? A. That's right.

Q. And the issuance of a patent,in the case where the examination of the patent had been made in connection with the patent application? A. That's right. And, of course, the reports had a [4770] general format that they covered concerning the historical aspect, the geology, land ownership, and so on, so there was pretty much a standard format that they followed in the compiling of a field report.

Q. Was a favorable mineral examiner's report which had been approved by you given further review by anybody else? A. Yes.

Q. Who reviewed it? A. I'm sure they got—at least, as to any of the legal facets of a report, they would get some review in our own Adjudication Section in the Land Office, and also at the Washington level, if and when they were submitted there.

Q. So far as you understand, the reports were read by the Adjudicator in the State Office? A. That's correct.

Q. In the Land Office of the State Office? A. That's right.

Q. And were then read again in Washington? A. That's correct. Now, the Land Office probably would not

give it a review as to the physical features of the land, for example, possibly discovery requirements, unless there was some legal phase. But they would—their review was confined to the legal phases of the report.

Q. Did your office or the Land Office conventionally submit mineral examiners' reports to the Regional Solicitor? [4771] A. Yes, we do.

Q. You sent them to the Solicitor yourself? A. They were probably submitted over the State Director's signature.

Q. This was invariably done? A. Not invariably, no.

Q. Do you know whether the Director of the State Office reviewed each mineral examiner's report? A. I don't think he did.

Q. Did the Area Administrator have any function in reviewing these reports? A. Up until or when we were under the old Area administration, we did have a staff mineral man out there; I think he may have reviewed them at that time.

Q. When you are speaking about the old administration, to what period are you referring? A. Well, we had an area setup from about 1954 to—gee, I don't know, maybe '58, thereabouts.

Q. Mr. Hall, when a report had been submitted to you by the examiner and you had read it and approved it, to whom or to what office was that report sent? A. To the Land Office.

Q. Was it accompanied by a recommendation from you as to what action should be taken? A. Yes, usually, usually.

* * * *

[4794] Q. (By Mr. Hulbert) Mr. Hall, I direct your attention to page 40 of Plaintiffs' Exhibit 11, and ask you what recommendations were made in that report. A. The recommendation was made that adverse action be taken against each of these claims, "charging that the assessment work has not been done each and every year since the date of the leasing act."

Q. Did that alert you to the possibility that these claims had been the subject of assessment work proceed-

ings? A. If I saw it at the time, I—I certainly can't remember whether I did or not.

Q. Do you have any reason to suppose that you did not? A. I have no way of knowing, because I might have relied on the practice of—or recommendation of the mining engineer.

Q. Did you regard Mr. Sholes as an experienced mineral examiner? A. Yes.

Q. Was Mr. Sholes aware, so far as you knew, of prior assessment work contest decisions? A. I'm sorry, you will have to repeat that.

[4795] Q. Did you have any knowledge as to whether Mr. Sholes was informed of prior assessment work contest decisions? A. Yes, I'm sure he was.

Q. Referring you to Plaintiffs' Exhibit 10, which is the 1957 report, and particularly pages 6 and 7 of the report, Mr. Sholes made two recommendations, did he not? A. Yes. He recommended that—

Q. He first recommended that the applicant be required to show that the description of the claims, as shown in the application, represented the location of the claims as originally staked? A. On the ground, right.

Q. And his second recommendation was that, if that was satisfactorily done, that a charge be raised concerning the sufficiency of patent work, is that correct? A. The sufficiency of the $500.00 worth of labor, yes.

Q. Did Mr. Sholes make any other adverse comments about the application or the claims? A. Not in this—not that I see here.

Q. Consistent with the practice of mineral examiners, Mr. Hall, would it not have been a fact that had Mr. Sholes believed any other grounds upon which the application was deficient existed, his report would have noted them? A. I think so.

Q. Mr. Hall, do you recall whether at or after the [4796] date of Mr. Sholes' report in 1957, you became familiar with the file in a contest proceeding that had been brought against the Oyler claims at an earlier time? A. Are you talking about these old contests here?

Q. Yes. A. I don't remember.

• • • •

[4879]

PLAINTIFF'S EXHIBIT 309

Deposition of William L. Shafer

Washington, D. C.

June 17, 1966

* * * *

[4885] Washington, D. C. Friday, June 17, 1966

Deposition of William L. Shafer, formerly of the Bureau of Land Management, Department of the Interior, called for examination by counsel for the plaintiffs in Civil Actions Nos. 8680, 9202, and 9465, pursuant to notice (a copy of which is attached to the court copy of this transcript), before Dorothy B. Delehanty, a notary public in and for the District of Columbia, in the law offices of Cleary, Gottlieb, Steen & Hamilton, 1250 Connecticut Avenue, Northwest, Washington, D. C., 20036, commencing at 10:15 a.m.

[4886] Appearances: On behalf of the plaintiffs in Civil Actions Nos. 8680, 9202, and 9465: Cleary, Gottlieb, Steen & Hamilton By: Richard W. Hulbert, Esq., of their New York City office, 52 Wall Street, and Donald L. Morgan, Esq., of their Washington, D. C., office, 1250 Connecticut Avenue Northwest. On behalf of the defendant in all five causes: Thomas L. McKevitt, Attorney, Department of Justice, Room 2127 Department of Justice Building, Washington, D. C.

Also Present: Glen E. Taylor, Attorney, Department of Justice, and Edwin H. Montgomery, Chief, Mining Staff, Bureau of Land Management, Department of the Interior.

* * * *

[4889] Proceedings

MR. HULBERT: I should like to say before we begin that this deposition of Mr. William Shafer is being taken pursuant to notice served on an Assistant United States Attorney, Mr. David Shedroff, in the District of Colo-

rado, on June the 8th, and filed in the United States District Court for the District of Colorado on June 9th. A certified copy was submitted to the District Court in the District of Columbia, and the subpoena was issued at the request of plaintiffs, and Mr. Shafer is appearing here this morning pursuant to that subpoena. Whereupon—

WILLIAM L. SHAFER

was called for examination by counsel for the plaintiffs in Civil Actions Nos. 8680, 9202, and 9465 and, having been first duly sworn by the notary public, was examined and testified as follows:

DIRECT EXAMINATION BY MR. HULBERT

* * * *

Q. What is your present occupation or position? [4890] A. Consultant of the House Interior and Insular Affairs Committee.

Q. How long have you occupied that position? A. Since August 15, 1965.

Q. Prior to your present position, what was your position? A. I was employed by the Bureau of Land Management, Department of Interior, from 1955 to August of 1965. I was located in Washington, D. C. Prior to that, I had worked for the Bureau of Land Management in San Francisco, Sacramento, Reno, Nevada, and various other locations in the western states.

Q. What was your title during your period in the Bureau inWashington? A. Chief, Branch of Mining.

Q. In what division of the Bureau was that? A. Well, originally it was a division of the Division of Minerals, but titles changed, my title changed, but the duties were essentially the same. But for the majority of the time, I was Chief of Branch of Mining within the Division of Minerals.

Q. Would you review briefly for us, Mr. Shafer, your education and experience prior to the time you went to work for the Department of Interior. A. I obtained a degree in geology in 1942. I had [4891] worked for the

Bureau of Reclamation for a short time. I had worked for Remington Arms as an industrial engineer. I worked for E. I. du Pont de Nemours as an industrial engineer. I entered the Navy in 1944. I was in the Navy until 1946. I was then employed by the Corps of Engineers until 1949, when I transferred to the Bureau of Land Management.

Q. What was your position, what job with the Army Engineers? A. Valuation engineer in the examination of mining claims and mineral properties.

Q. What was your job in the West for the Bureau of Land Management? A. As a valuation engineer, the duties were essentially the same: the examination of mineral properties, patent applications, and to a minor extent, land cases. But primarily in the minerals field.

Q. Could you generally describe for us your duties and functions as a valuation engineer in the Department of Interior. A. You were charged with the responsibility of examining mining claims for patent, was one of the functions, or for any conflict of the mining claim with other uses. You determined the validity and recommended that patent issue or a patent not issue, or you recommended that a contest be brought against the claim for various reasons.

[4892] Q. As a valuation engineer—Incidentally Mr. Shafer, is a valuation engineer a mining engineer? Are they synonymous terms? A. A valuation engineer is a civil service terminology, and it has no comparable equivalent that I know of in the professional—A valuation engineer could be a mining engineer, or it could be a geologist, or it could be a combination of various other degrees that are given by a university.

Q. My question perhaps was not quite clear. I meant, are valuation engineers commonly referred to as mining engineers in just parlance, discussion, reference? A. They could be, but whether they—I think, yes, they are either referred to as mining engineers or as geologists or valuation engineers. It's somewhat interchangeable.

Q. As a valuation engineer for the Bureau, did you become familiar with the manner in which patent applications were processed at the time? A. Yes.

Q. Would you tell us very briefly how that processing was then carried out. A. Well, upon application, or upon submission by an applicant of an application for a patent, a mining engineer or a valuation engineer was assigned the case, and it was his responsibility, after assignment of the case, to make [4893] what record examinations he felt was necessary to physically examine the claim, to sample the claim in the manner that he thought proper, to determine whether the claim was geographically located substantially in accordance with the plat or the description of the claim. It was then his responsibility to submit his recommendation as to whether he thought the claim was justified to go to patent.

Q. Were there functions with respect to the processing of patent applications at that time performed in the Land Office? A. Yes, there were.

Q. What were they? A. At approximately the same time, a copy of the application would go to the Land Office where upon receipt, first receipt, it would be preadjudicated. This was a preliminary type of adjudication, primarily to see that the land, subject of the application, was open to mining location, and a few other essentials, would meet the requirements of the mining law. At a subsequent time, it received a detailed adjudication by personnel in the Land Office. This would go to the citizenship and all the other requirements that were necessary for a patent application.

Q. You said at a subsequent time. Did you mean that the manner in which this was done changed at some point in [4894] time? A. No; I meant at a time subsequent to the first preliminary preadjudication.

Q. Was that done in the local Land Office or done in Washington?—this more extensive review you speak of. A. That was done—

Q. I am speaking now of the time that you were a valuation engineer. A. At the time I was familiar with it, it was done in the field.

Q. Was any part of the process of reviewing a patent application performed in Washington at that time, if you recall? A. Prior to about 1952, it is my understanding that a rather detailed examination of all patent appli-

cations was made in Washington. I was not in Washington at that time, but this is my understanding, that prior to about 1952, adjudication, or another adjudication, a final adjudication was performed in Washington.

Q. You said that part of the function of the valuation engineer, his work in connection with the processing of a patent application, included a check of the records he felt necessary. A. Yes.

Q. Mr. Shafer, would that have included a check with [4895] any prior administrative contest proceedings involving the property which was the subject of the application? A. If he suspected or had reason to believe that there were prior contests or prior actions, it would have been his responsibility to make a check, or to see that a check was made.

Q. Mr. Shafer, you have used the term "adjudication" in the course of describing the processing of a patent application. Am I right that that is a term that, as you use it, refers to the administrative steps taken in processing or reviewing the application? A. Yes, it is.

Q. Do you know, Mr. Shafer, whether there were available to the adjudicators in Washington any official records of the Department, relating to the status of the lands involved in the patent application? A. Yes. All records, or practically all records, were available to the adjudicators in Washington, because in what was termed at that time, or subsequently termed the Eastern States Office, there were essentially duplicate records in Washington that were maintained in each of the State Offices.

Q. Do you know whether these records were checked by the adjudicators in Washington in the course of processing an application? [4896] A. During what period of time?

Q. Well, I am now speaking of the time when you were in the field, if you know. A. Well, I wouldn't know of personal knowledge, because I wasn't in Washington. It is my understanding that these records were checked by adjudicators or by record checkers in the Eastern States Office.

Q. Were these records checked after you came to Washington, if you know? A. Yes, for a short period of time they were, because shortly after I came to Washington, or almost upon my arrival in Washington, the processing of patent applications and the final adjudication of patent applications was decentralized to the field.

Q. Can you identify a little more precisely for us the nature of these records which you have described as available in Washington? A. Well, it was a complete set of public land records, plat books, tract books, records of prior action on each piece of federal land. It would include mineral leases. It would not include in all instances mining claims, because mining claims are not recorded originally with the Federal Government. But it would include contest actions, or actions that had been initiated by the Federal Government against mining claims.

[4897] Q. Mr. Shafer, you said you came to Washington in the Minerals Division in 1955. Would you tell us what your duties and responsibilities were in that post. A. I was staff officer in charge of mining, and it was my responsibility in that capacity to give direction, technical direction to the field on mineral matters, primarily mineral patent applications, mining claims, and adjudication of these applications, to prepare regulations, procedures, and instructions, and generally act as an adviser to the director or to my superior, who was Chief of the Division of Minerals.

Q. Did your functions include any specific responsibilities with respect to the processing of mineral patent applications? A. Yes.

Q. What were they? A. There were two responsibilities: One was a general review for the sufficiency of procedure, regulations, and the accuracy of the field offices in following the regulations or the procedures. The other function was a spot-checking of patent applications that were submitted to Washington for patenting.

Q. Mr. Shafer, what was the chain of command, if I can use that term, between you and the Director of the Bureau of Land Management during the time you had your position with [4898] the Minerals Division in Wash-

ington? A. My immediate superior was the Chief, Division of Minerals. His superior, immediate superior, was Assistant Director for Lands and Minerals. And then, we had the Associate Director for the Bureau of Land Management, and then the Director.

MR. HULBERT: Would you read me the first part of that answer, please.

(Record read.)

BY MR. HULBERT: Q. Mr. Shafer, who occupied the post of Chief, Division of Minerals, during your tenure in Washington? A. For approximately the first two years, it was Louis E. Hoffman, and after about 1957 it was Max Caplan.

Q. Is either Mr. Hoffman or Mr. Caplan still with the Department? A. Mr. Caplan is.

Q. Do you know what post he holds now? A. I don't know the exact title that he holds. I think it's Chief, Branch of Program Planning, or something like that. I'm not sure of the exact title.

* * * *

[4902] Q. Mr. Shafer, which if any of these officials who were in your chain of command actually had any part in the review of patent applications in Washington? A. At one time or another, all of them would have had some responsibility for review, or at least for surnaming and approving patent applications. Possibly I should modify that to say that either patent applications or appeals and decisions that were written pursuant to contests that may have been started against mining claims which were subject to patent applications.

MR. HULBERT: I'm sorry. Would you read that answer, please.

(Answer read.)

BY MR. HULBERT: Q. Mr. Shafer, you have mentioned the practice of surnaming. I wonder if you would tell us a little bit about it. First let me show you—Well, let me get a document [4903] marked.

MR. HULBERT: Would you mark this Plaintiff's Exhibit 36. It is a copy of a letter dated August 29,

1950, from Mr. Doty, Assistant Secretary of the Interior, to Mr. Barney L. Whatley.

(Letter described was marked as Plaintiff's Exhibit 36 for identification.)

BY MR. HULBERT: Q. Mr. Shafer, I hand you the document that has been marked Plaintiff's Exhibit 36. Directing your attention to the box in the upper right-hand corner, I ask you if that is an illustration of the practice of surnaming to which you referred. A. That is.

Q. Can you identify any of those names? I apologize for the fact that it isn't the best possible copy. A. I can recognize two signatures: the first one, Giller; and the next-to-the-last one is Hom, as it is written here, Hom. And yes, I recognize the third signature, of Clawson.

Q. Now, who is Mr. Giller, the first of the gentlemen you mentioned; do you know? A. I don't know what Mr. Giller's title was in 1950, but from 1955 until 1965, Mr. Giller was Chief of the Branch of Leasing within the Division of Minerals, and was my [4904] counterpart in the Division of Minerals. He had similar duties on leasing as I had on mining.

Q. And who is the Mr. Hom, H-o-m, that you referred to? A. Well, Mr. Hom is now, or was when I left, a Chief of the Division of Appeals in the Solicitor's office.

Q. And the third name you identified as Clawson, was that C-l-a-w-s-o-n? A. He was a Director of the Bureau of Land Management.

Q. As of 1950? A. As of 1950, until about 1960, I suppose. No, 1953.

Q. What did these surnames indicate in the practice of the Department during your period there? A. It indicated that the individual that surnamed it had read—

MR. McKEVITT: If you know.

MR. HULBERT: Yes.

MR. McKEVITT: I mean, are you talking about the other people or yourself?

THE WITNESS: I am talking about my general understanding of what surnaming meant to me and what

I understand it meant to other people within the Department.

MR. McKEVITT: Just for the record, I will note an objection to that question.

MR. HULBERT: Let's go at it this way, Mr. Shafer: [4905] BY MR. HULBERT: Q. During the period when you were in the Department, was there a practice known to you of surnaming documents? A. Yes, there was.

Q. Did you yourself surname documents? A. Many.

Q. What did you understand the effect of your surname on the document was? A. That I had read and approved, to the extent of my capacity in which I was acting, I had read and approved the document and surnamed it.

Q. If you had not approved the document, what would you have done with respect to the surname practice? A. There were two things you could have done: either refuse to surname it, or surname it with a qualification, say that I approve as to this portion but not as to some other portion. It would be a qualified approval.

Q. Was this surnaming procedure in the Department a practice that you were instructed to follow when you came to Washington? Or, to put it another way, how did you know, Mr. Shafer, that you were expected to surname documents? A. I think the procedure was explained to me that this was the procedure; in your capacity as a reviewing officer, you reviewed it, and because you were not the one that gave final approval, or you didn't sign the document, this signified the [4906] fact that you had read and approved the signature, and it would be a notification to your superior that you had reviewed and agreed with the contents of the memorandum.

Q. During your period in Washington, Mr. Shafer, did you acquire any understanding as to whether the practice of surnaming had been employed in the Department in prior years: that is, prior to the time you got to Washington? A. Yes, it was my understanding it was not a new procedure.

Q. Was it your understanding that the prior practice was as you described it to have been during the time you were there? A. It is.

MR. HULBERT: Off the record.

(Discussion off the record)

BY MR. HULBERT: Q. Now, Mr. Shafer, were you yourself expected to review patent applications for mineral claims that came to the Director's office in Washington? A. Not all of them; but under certain circumstances we were expected to review a sufficient number of them that we were satisfied that the procedures and regulations of the Department were being followed by the field offices.

* * * *

[4912] Q. Was a part of that review, Mr. Shafer, to check old contest records of contests involving oil shale patents? A. It would be, if there was any indication that a previous contest had been brought against the claims, or if there was not information in the file that someone else had previously checked to determine if a contest had previously been brought against these claims.

Q. How did your office proceed to inquire whether contest decisions had been rendered against oil shale claims? A. If there was any indication in the mineral examiner's report, or any memoranda from the state office, which would indicate that the previous—or that they had been checking for a previous contest brought against the claims, this would be an indication to us whether or not someone else had checked. If they had not, we would either check ourselves or send it back to the field office for checking.

Q. How would that check be made, if your office were to do it? A. By calling for whatever documents were necessary, either from the record center or the archives, or from the Eastern States office, and trying to determine from the records available what previous actions had been initiated by the Government.

[4913] Q. What records were available for that purpose? A. There were the regular tract and plat books in the office; there was a contest docket, and there were

a set of what we termed "special oil shale plat books," which had been compiled sometime in the middle or late thirties, and which supposedly was a record or the best available record of all previous actions taken on oil shale claims in three states. We used those special plat books rather extensively.

Q. Which three states were those? A. Colorado, Utah, and Wyoming.

Q. And these special plat books, as you describe them, contained references to contest decisions? A. They contained reference to contest decisions, to mining claims, the location of mining claims geographically, and to previous actions that had been taken against the claims.

Q. You said earlier, Mr. Shafer, that in general, the Department did not have adequate or complete records of unpatented mining claims. Do I understand you to say that these special oil shale plat books did contain data respecting unpatented claims? A. They contained data respecting unpatented oil shale claims, quite likely not all oil shale claims, but the best available record that the Department or, so far as I know, that anyone else had, other than the county offices, county recorders' offices themselves.

[4914] Q. Do you recall, Mr. Shafer, whether the special plat book itself contained material that would answer the question as to the ground on which the contest had been brought? A. No, it did not.

Q. Well, how did you go about finding that? A. The plat books would contain a township diagram, the township was divided, subdivided into sections and into quarter sections, and in each quarter section. If there was an existing oil shale claim that the Government had taken any previous action against, it would be listed either by name and/or by what we called a miscellaneous number. By using this number or any other number that was given, you could obtain the original records that would give you the information as to action that had been taken on that particular claim.

Q. Would the original records be obtained? A. I don't—

Q. I mean, is that what you do? Do you go to the plat book to get the number? A. If you had a question on it, they would be obtained, yes.

Q. Where were the original records kept? A. In various places. Some of them are still within the Department, some were in the record center, and as I recall, some were in the archives.

[4915] Q. Mr. Shafer, perhaps to repeat a question I asked you earlier: This process that you are describing as performed in your office as a review of a complete adjudication that had been performed in the field; is that right? A. Yes. The mineral patent application—now speaking of oil shale—would have been processed in the field offices, primarily in Colorado, because they were most active. They would have approved the patent application for patent, sent it in to Washington, and in the normal course of events, patent would have issued by the patenting section, except that we were instructed to review or to give another review of these oil shale patent applications to assure accuracy.

Q. During your time in Washington, was it your understanding, Mr. Shafer, that the state offices performing this initial adjudication of oil shale patent applications were supposed to check for prior contests against oil shale claims?

MR. McKEVITT: I object to the form of that question. A. Yes.

BY MR. HULBERT: Q. Were you familiar, Mr. Shafer, during your time in Washington, with the extent to which the state offices were or were not supposed to check for prior contests? A. I was familiar with the extent with which we asked [4916] them to check, and instructed them to check, and advised them to check. I don't think I was physically present in the Land Office at any particular time when they actually made the check.

Q. But if the state offices acted pursuant to the instructions and advice that the Director's office had given them, they would check, would they not? A. They would check.

Q. What if any records, if you know, or other source of information, were available to the state offices in con-

nection with any check that they might have made of prior contests against oil shale claims? A. You mean within the state office itself?

Q. Yes. A. Or what could they have obtained—

Q. More broadly, what either was there,available to them,or elsewhere available to them? A. Well, they had the same access to records that we had; in the archives, the record center. They were furnished, as I recall, with microfilm copies of these special plat books, and instructed to refer to them when necessary or appropriate, within their particular offices. I think they had essentially the same information that was available in the Eastern States Office in Washington, but they would not have, of course, the records that were in the record center [4917] or the archives, but they could call for them.

Q. Mr. Shafer, if you know, were there contest dockets in the state offices? A. There were contest dockets in the state office (sic). I don't know what period of time that they covered. And this practice, to some extent, varied from office to office.

Q. Focusing you particularly on the Colorado State Office. A. I'm not positive. I don't know.

Q. Mr. Shafer, what was the purpose of checking the records of these old contests against oil shale claims, as performed in your office?

THE WITNESS: Would you repeat that, or read it back?

(Pending question read.)

A. To determine what charges and what final action had been taken against the claims in previous years?

BY MR. HULBERT: Q. Did it come to your attention, Mr. Shafer, in the course of your work in Washington, that contests had been brought previously against oil shale claims on grounds of failure to perform assessment work? A. Yes.

Q. Did you know that, prior to the time that you came to Washington in 1955? [4918] A. I did.

Q. Was it your impression that the number of these contests was substantial? A. Yes, it was.

Q. During your tenure as Chief of the Mining Branch of the Minerals Division, did it come to your attention that patent applications were being processed for oil shale claims that had previously been declared null and void for failure to perform assessment work? A. Yes.

Q. When did that first come to your attention, Mr. Shafer? A. Probably very shortly after my arrival in Washington, in the middle of 1955 or early 1956.

Q. Did you at that time make any investigation or inquire as to the effect of these decisions against oil shale claims on the ground of failure to perform assessment work? A. Yes.

Q. What inquiry or investigation did you make? A. Well, the first inquiry was probably with the Solicitor's office, or was with the Solicitor's office, with a Mr. Bradshaw, Clarence Bradshaw, who was, I think, Assistant Solicitor or Associate Solicitor for Public Lands. It was discussed extensively with him, certain previous documents and cases that he suggested for review were obtained [4919] and looked at, and I think there were discussions certainly with my superiors. The first one would have been Luther Hoffman—Louie Hoffman, and subsequently with Max Caplan, on the effect of these previous contests for failure to do assessment work.

Q. Do you recall inquiry or conversations with any others of your superiors? A. Yes; at various times it was discussed with Ed Woozley.

Q. He is the person you identified earlier as Director of the Bureau of Land Management? A. Yes, he was a Director. It was discussed with other individuals in the Solicitor's office: Frank Cotter at various times. I'm sure that it was discussed with several other people, but not necessarily my superiors.

Q. What instructions, Mr. Shafer, if any, did you receive or answers did you get to your inquiries as to what effect was to be given to these old decisions on assessment with grounds? A. That insofar as issuing patent applications, if the charge of failure to do assessment work was the only charge, it was to be ignored, and had been ignored.

Q. Did you proceed, your office proceed to review oil shale patent applications, consistent with those instructions? [4920] A. Yes.

Q. Were your superiors aware that youroffice was reviewing oil shale patent applications consistently with those instructions?

MR. McKEVITT: I object to that, the form of that question.

(Discussion off the record)

MR. HULBERT: Would you read that question, please.

(Question read.)

BY MR. HULBERT: Q. Mr. Shafer, at any time did you report to your superiors that your office was reviewing oil shale patent applications, consistent with those instructions? A. Yes, many times.

Q. Mr. Shafer, when an application came from the state office, an oil shale application I mean, now, came from a state office to the Director's office, would it include the mineral examination report? A. Yes. If it did not, if it had been inadvertently left out and it came to us for review, we would request the mineral examiner's report.

Q. And in reviewing the application, Mr. Shafer, would you or one of your subordinates read the mineral examiner's field report? A. In detail.

* * * *

[4923] Q. Mr. Shafer, did you give your assistants any instructions with respect to what they should do in any case where they encountered an oil shale patent application involving claims which had previously been the subject of a contest decision solely on assessment work grounds? A. Yes, I think we discussed it many times; and the instructions I gave to them were the instructions I had received, or my understanding of those instructions, that the previous contest, where the contest had been brought solely for failure to do assessment work, would be ignored, and patent would be issued.

Q. Mr. Shafer, I show you a document, copy of a document dated June 15, 1956, and ask you if you recognize the signature. A. I do.

Q. Is that your signature? A. That's my signature.

* * * *

[4926] Q. In the course of the review in your office, would the mineral report which has been re-marked Plaintiff's Exhibit 6 come to your attention? A. Yes, it would.

Q. Would the material in the fourth full paragraph on the second page of the mineral report marked Plaintiff's Exhibit 6 have—

MR. McKEVITT: I object to the form of the question.

MR. HULBERT: Well, I'll try again.

BY MR. HULBERT: Q. Referring you to the second page of the mineral report which has been re-marked Plaintiff's Exhibit 6, let me ask you whether there is a reference there to a prior assessment work decision against the Champion No. 5 claim. A. Yes, there is.

Q. Would the disclosure of the fact of a prior decision, adverse to the claim on that ground, have provided any basis for rejection of the application in your office? A. No.

* * * *

[4931] Q. Whose signature is that? A. Bob May, or Robert F. May.

Q. And he is the gentleman you identified as one of your assistants? A. He was one of my assistants, yes.

Q. Do you know what position Mr. May now holds? A. He is either in Berea, Kentucky, working for the Forest Service at this time, or he has transferred to the Washington office of the Forest Service to be in charge of their mineral activities on national forest lands. Whether he has arrived or whether he is on the way or coming, I don't know, but he will be in Washington shortly.

Q. Can you tell me, Mr. Shafer, whether the note above the signature "Robert F. May" is in Mr. May's handwriting? A. Yes, it is; to the best of my knowledge, yes.

Q. Can you tell us what the reference in that note to "Case file 1337597" refers to? A. Yes. These are old case file numbers or miscellaneous numbers, that referred to previous contests or previous actions brought against this particular claim.

[4932] Q. Would the reference or the note, "Contest 12025," have referred to the contest number of a prior proceeding— A. It would.

Q. —involving this claim? A. It would involve these particular claims.

Q. The rest of the note, as I read it, says, "Has been reviewed for charges regarding assessment work. All appears in order and patent may issue." A. That's correct.

Q. What would you have understood that to mean? A. That Mr. May had reviewed the case for any previous contests, and specifically for contests regarding assessment work. He doesn't indicate whether a contest had or had not been brought, in his note, but he was of the opinion that all was in order; and there was some type of contest pending, as indicated by the reference to Contest 12025.

Q. And you would take this as indicating that Mr. May had reviewed those files?

MR. McKEVITT: I object to the form of that.

BY MR. HULBERT: Q. Would this note, Mr. Shafer, have given you any indication as to whether or not Mr. May had reviewed these files? A. It would.

Q. And what would the indication have been? [4933] A. That he had reviewed the files, the case file pertaining to this particular contest, and that he had satisfied himself as to the contents of these files, and recommended the case for patent.

Q. If Mr. May had acted pursuant to any instructions you had given him, would he have noted that charges other than assessment work had been raised, had they been raised? A. He would. (Simultaneous with:)

MR. McKEVITT: I object to the form of that question, too.

THE WITNESS: I said he would have.

BY MR. HULBERT: Q. Had you given your assistants any instructions as to what they should look for in reviewing those contest files? A. Yes.

Q. Had you given them any instructions as to what totations or information they should convey to you regarding the contents of those files? A. Yes.

Q. What had you instructed them to review? A. Well, to completely review the patent application and the necessary files, or contest dockets, contest cases; and if the only charge in the previous contests or previous actions was one of failure to do assessment work, the case [4934] would be passed for patent. If other charges, such as lack of discovery, fraud, or any other charge had been brought, the case would be examined further and, in all probability, returned to the Colorado Land Office for further action, with our recommendation that this case did not appear to be in order for patent.

Q. Mr. Shafer, if you will recall, can you tell us whether a document called a Minerals Work Sheet would have been part of an oil shale patent application file as it came to your office for review? A. It should have been, yes. That was the procedure.

MR. HULBERT: May I have this document marked, Minerals Work Sheet regarding Mineral Entry C020379 on the G. M. 17 and 18.

(Minerals Work Sheet described was marked as Plaintiff's Exhibit 40 for identification.)

BY MR. HULBERT: Q. Mr. Shafer, directing your attention to the document that has now been marked Plaintiff's Exhibit 40, let me ask you if you can tell me what that is. A. Yes. That's a copy of a Minerals Work Sheet which was ordinarily prepared in conjunction with the Land Office examination and adjudication of a mineral patent application.

* * * *

[4938] Q. Mr. Shafer, you have said earlier that you were instructed that oil shale claims which had been nullified solely on the grounds of assessment work were not, for that reason, to be rejected for patent. Can you

tell us whether any distinction was made in these instructions which you say you received which depended upon the procedural status or posture of the assessment work contest decision?—if I am making myself clear. A. I'm not sure that you are.

Q. Well, let me rephrase or put another question in these terms: Were the instructions given you with respect to the effect to be given to assessment work decisions confined to, for example, assessment work decisions which had been rendered by the Commissioner of the General Land Office, or to decisions which had been appealed to the Secretary, or to any particular categories of these cases, as distinct from others? A. No particular category. The instructions applied across the board to any contest that had been brought for failure to do assessment work.

Q. Did it depend on whether all or less than all of the claimants had been served with process? A. No.

* * * *

[4945]

CROSS-EXAMINATION BY MR. McKEVITT

* * * *

[4949] Q. What was their function? A. At what—?

Q. —with respect to a patent application? A. At what time?

Q. After 1955. A. Their function was to advise the people in the Bureau of Land Management if we raised legal questions and brought the mineral patent application and the question to their attention.

Q. You mean that wouldn't see it unless you would have raised some question? A. Not all the time. Now, there were certain classes of applications, and oil shale was one of them, that Mr. Bradshaw kept a rather close control and had a close personal interest in. I think many of those, if we had any question at all, were discussed with Mr. Bradshaw.

Q. But otherwise, the entire patent application process was a function of your office? A. Function of my office as a staff assistant to the Director and to the Chief of the Division of Minerals.

Q. But you made no final decision with respect to title, for instance? A. No.

* * * *

[4970]

REDIRECT EXAMINATION BY MR. HULBERT

* * * *

[4972] monograph.

Q. Mr. Shafer, in the course of your duties after you came to Washington, did you have occasion to make any thorough study of what mineral examiners in Colorado had been doing previous to that date with regard to checking for old contest decisions against oil shale claims?

THE WITNESS: Would you repeat that, please?

MR. HULBERT: Would you read it back.

(Pending question read.)

A. I don't know whether you would call it a study or not. I was certainly familiar with it and had discussed it with many of the mineral examiners and the Land Office personnel in Colorado.

BY MR. HULBERT: Q. What were these discussions, Mr. Shafer? A. That as far as any previous decisions or previous contests, if they pertained only to the question of failure to perform annual assessment work, they were ignored insofar as issuance of patent was concerned.

Q. Do you know, Mr. Shafer, whether or not, prior to 1956, mineral examiners in Colorado did or did not check to see whether there had been prior contest decisions against oil shale claims? A. Prior to '56? No.*

* * * *

[5176]

PLAINTIFF'S EXHIBIT 313

The Oil Shale Corporation, et al. v. Udall,

Civil Action 8680

Plaintiffs' Interrogatories
and
Defendant's Answers Thereto

1. Int. Identify, by file number, date of issuance, name of lessee and description of the land involved, each oil and gas lease covering any part of the land embraced within any of the mining claims involved in this action which was issued by the United States in reliance upon the established invalidity of the claims, as alleged in defendant's Sixth Defense.

A. It has been impossible to establish whether any employees of the Department of the Interior issuing oil and gas leases specifically did so "in reliance upon the established invalidity of the claims." . . .

6.(a) Int. State whether between 1930 and 1962 any officer or employee of the Department of the Interior ascertained or sought to ascertain, as part of or with respect to processing of any federal oil and gas lease application for lands in Colorado, whether the land was embraced within mining claims for which no patent application was then pending.

A. Defendant does not know, nor does defendant presently intend to submit evidence on this matter.

9.(a) Int. State whether between 1930 and 1962 any officer or employee of the Department of the Interior refused [5177] to issue any oil and gas lease for land in Colorado on the ground that any part of the land applied for lay within a mining claim, where no patent application for the claim was pending.

A. Defendant does not know, nor does defendant presently intend to submit evidence on this matter.

12.(a) Int. State whether between 1935 and 1962 any officer or employee of the Department of the Interior cancelled any oil and gas lease, or any part thereof, for land in Colorado on the ground that part or all of the

leased land lay within a mining claim, where no patent application for the claim was then pending.

A. Defendant does not know, nor does defendant presently intend to submit evidence on this matter.

15. Int. State whether the defendant contends that any lessee under any oil and gas lease identified in answer to Interrogatory No. 1 entered into such lease in reliance upon the invalidity of any claim in suit embracing land subject to the lease.

A. Defendant does not intend to present testimony by any individual lessees on this point. . . .

17. Int. State whether the defendant contends that any lessee under any oil and gas lease, not identified in answer to Interrogatory No. 1, covering any land embraced within any claim in suit entered into such lease in reliance upon the invalidity of the claim.

[5178] A. See answer to 15.

20a. Int. State whether between 1930 and 1962 the Department of the Interior, in connection with the issuance or administration of any oil and gas lease on public lands in Colorado, gave a warranty of title to the leased lands and/or to the oil and gas.

A. Defendant does not know and has no evidence at the present time to indicate that any such warranties were given during the 32-year period designated. . . .

25.(a) Int. State whether between 1930 and 1962 any officer or employee of the Department of the Interior ever refused a request that the Department or the United States undertake an obligation to defend an oil and gas lease for public lands against prior mining claims.

A. Yes.

27. Int. State whether the United States, between 1930 and 1962, ever defended the validity of an oil and gas lease for public lands against prior mining claims.

A. Defendant does not know.

28. Int. If the answer to Interrogatory No. 27 is in the affirmative, state whether it was the policy or practice of the Department of the Interior during such periods so to defend the validity of oil and gas leases on public lands.

A. See answer to 27.

29. Int. If the answer to Interrogatory No. 27 is in the negative, state whether it was the policy or practice of the Department of the Interior during such period to decline or refuse so to defend the validity of [5179] oil and gas leases on public lands.

A. See answer to 27.

31. Int. State whether, between 1930 and 1962, the United States refused or rejected a request by an oil and gas lessee of public lands that the United States defend, against prior mining claims, title to the oil and gas.

A. Yes.

32. Int. If the answer to Interrogatory No. 31 is in the affirmative, state whether it was the policy or practice of the Department of the Interior during such period to refuse or reject such requests.

A. Defendant does not know.

35.(a) Int. State whether between 1930 and 1962 any officer or employee of the Department of the Interior, in connection with processing of an oil shale mining claim patent application for land in Colorado and issuing patents therefor, cancelled any oil and gas lease to the extent that it embraced lands within the mining claims being patented.

A. Yes.

38. Int. State whether defendant contends that any grazing lease or grazing permit covering any part of the land embraced within any of the subject mining claims was issued by the United States at any time in reliance upon the established invalidity of the claims.

A. It has been impossible to establish whether any [5180] employees of the Department of the Interior issuing grazing privileges did so "in reliance upon the established invalidity of any of the subject mining claims.

A. Defendant does not intend to present testimony by any parties holding grazing privileges. . . .

57. Int. State whether (other tnan by issuance of oil and gas leases or grazing leases, licenses, or permits) the United States in reliance upon the established invalidity of the claims in suit administered the land embraced within the claims as being free and clear of plaintiffs' claims, as alleged in defendant's Sixth Defense.

A. The defendant does not know. . . .

62. Int. State whether the defendant contends that any party (other than the United States) to any transaction (other than an oil and gas lease or a grazing permit or lease) involving the lands embraced within the subject mining claims entered into such transaction in reliance upon the invalidity of any of the claims in suit.

A. The defendant does not know. . . .

65.(a) Int. State whether between 1935 and 1962 any officer or employee of the Department of the Interior made inquiry, [5181] in connection with administration (excluding administration of oil and gas and grazing interests) or public land in Colorado for which no mining claim patent application was then pending, whether land involved was embraced within mining claims.

65.(b) Int. If the answer to Interrogatory 65(a) is in the affirmative, identify each occasion of such an inquiry. Include in such identification the serial number, if any, and nature of the interest being administered and the time of the inquiry.

65(c) Int. With respect to each occasion identified in answer to Interrogatory 65(b), state whether the facts bearing upon such inquiry are documentary or other, and, if documentary, identify each document by date, author, subject matter and present custody and location, and if other than documentary, identify by name, present title or position, if any, and present address each person known to possess knowledge of the facts.

A. Defendant does not know. If any evidence of any such inquiries is found, it will be given to the Plaintiffs before trial.

80. Int. State whether the case or other files in Contests 11757, 11759, and 11761 were received in the Denver Colorado Land Office between 1950 and the end of 1961, and if so, the dates or approximate dates of receipt. . . .

A. The records of the Colorado Land Office, Bureau of Land Management indicate the following: 1. Contest 11757 received "6/26/59 case file rec. in LO, chrg. to L&M". [5182] 2. Contest 11759 "6/26/59 Record from

BLM Wash. to St. Supr." 3. Contest 11761 "6/26/59 Record from BLM Wash. to St. Supr."

85. Int. State whether defendant contends that there ever has been or is now any obligation on the part of the owner or owners of an unpatented mining claim located in the State of Colorado on public lands to apply to the United States or any agency or instrumentality thereof for a patent.

A. Defendant does not so contend. . . .

115. Int. Referring to the abtracts of title to the mining claims in suit previously furnished to the defendant by the plaintiffs, in connection with this action, state whether the defendant contends that full record legal title to the claims is not vested in the plaintiffs.

A. The abstract of titles shows that the plaintiffs either obtained deeds from the successors in interest to the original locators or else foreclosed the interest of such successors in intereset by forfeiture proceedings. . . .

124.(a) Int. State whether in 1930, 1935, and subsequent years through 1960, officers and employeee of the Department of the Interior within the Office of the Secretary of the Interior and the General Land Office (Bureau of Land Management) who drafted or reviewed documents, placed their initials or signatures in the upper [5183] right-hand corner or elsewhere on a copy of the document.

A. Examination of some documents from the department's file for 1930, 1935, and subsequent years shows that at least in some instances, initials were placed on the file copy of various documents. Presumably, these initials were placed on the copies by persons who either drafted or reviewed it, or by persons to whom the copy was routed for information purposes.

126.(a) Int. Reference is made to the attached copies of first pages of Interior documents dated respectively June 7, 1930, November 13, 1930, May 26, 1933, June 16, 1939, May 21, 1943, February 14, 1944, May 3, 1946, and August 29, 1950, one or more of which bear the following names on the upper right-hand corner: Altizer, Barash, Bradshaw, Burlew, Chapman, Clawson, Cummiford, Ouckworth, Duncan, Edelstein, Edwards, Fahy, Friedman,

Finney, Fortas, Funck, Glavin, Giller, Goerner, Hilton, Hoffman, Hom, Howell, Hudson, Johnson, Margold, McDowell, Mendenhall, Muck, Obenchain, Sears, Speck, Stabler, Thomas, Towner, Wasserman, Willy, and Wolfsohn. For each of the preceding names, state: the full name of the individual concerned; the title, position, or functions of the individual within the Department of the Interior, as of June, 1930, or such later date on which he first became an officer or employee of the Department; any and all subsequent titles, positions, or functions of the individual within the Department [5184] of the Interior, through 1960; and the period of time the individual held each such title or position or performed such functions.

A. The materials requested in this interrogatory are being checked and will be furnished Plaintiffs' counsel as soon as available. The supplemental information furnished by the defendant in answer to this interrogatory has been offered as plaintiffs' Exhibits 306 and 307.

[5185]

PLAINTIFF'S EXHIBIT 314

Penelope Chase Brown vs. Udall, Civil Action No. 9202

Plaintiffs' Interrogatories
and
Defendant's Answers Thereto

3. Int. State whether the defendant contends that the United States at any time took any action or entered into any transaction involving the land embraced within the claims in suit in reliance upon a belief that any of those claims was invalid because of the 1931 or 1932 decisions in Contest 12039.

A. . . . . It is not known whether any action was taken specifically in reliance on the 1931 and 1932 decisions. . . .

10. Int. State whether defendant contends that any party other than the United States has at any time entered into any transaction involving land embraced within any of the claims in reliance upon a belief that the

claims were invalid because of the 1931 or 1932 decisions in Contest 12039.

A. Defendant does not know what may have motivated third parties into entering "into any transaction involving land embraced within any of the claims."

14. Int. State whether there is in defendant's possession, or to the defendant's knowledge, in existence, any writing subsequent to the 1932 decision in Contest 12039 signed by any of the plaintiffs or their predecessors in interest which defendant contends [5186] constitutes an admission of the validity or effect of or an acquiescence in the 1931 or 1932 decisions in Contest 12039.

A. Defendant does not know. . . .

20. Int. State whether at the date of the Manager's decision of February, 1962 rejecting the application for patent on the claims in suit filed in 1955 any recommendation was then being made by any employee of the Department of the Interior that patent be rejected on the claims in suit for any reason other than the 1931 and 1932 decisions in Contest 12039.

A. No particular recommendations were then being made dealing specifically with the subject claim.

34. Int. State whether defendant contends that full record legal title to the Oyler claims does not appear in the plaintiffs.

A. . . . . Defendant does not deny that plaintiffs have acquired whatever interest the original locators had to convey.

40. Int. Does the defendant contend that no oil shale claim has been patented by the Department of the Interior with knowledge of prior assessment work decisions adverse to the claim?

A. The answer to this interrogatory is no—assuming that the term "Department of the Interior" includes any and all of its employees.

[5187] 41. Int. Referring to the decision dated February 16, 1962, and signed by Dale R. Andrus, Land Office Manager, rejecting patent application C-012327, state (a) whether prior to February 16, 1962, any notice was given to the patent applicant, that the Manager or anyone else in Interior was considering rejecting the appli-

cation by reason, in whole or in part, of Contest 12039, (b) whether prior to February 16, 1962, the patent applicant was afforded any opportunity to present evidence or legal argument on any question whether the patent application should be rejected in whole or in part by reason of Contest 12039.

A. The answer is no. . . .

43. Int. State whether defendant contends that any grazing lease or grazing permit covering any part of the land embraced within any of the subject mining claims was issued by the United States at any time in reliance upon the established invalidity of the claims.

A. It has been impossible to establish whether any employees of the Department of the Interior issuing grazing privileges did so "in reliance upon the established invalidity of the claims." . . .

[5188] 48. Int: State whether the defendant contends that any grazing lessee or permittee under any grazing lease or permit identified in answer to Interrogatory No. 44 entered into such lease or permit in reliance upon the established invalidity of any of the subject mining claims.

A. Defendant does not know whether anyone holding grazing privileges relied on the established invalidity of the mining claims. . . .

52. Int. State whether (other than by issuance of grazing leases, licenses, or permits) the United States in reliance upon the established invalidity of the claims in suit administered the land embraced within the claims as being free and clear of plaintiffs' claims.

A. The defendant does not know. . . .

57. Int. State whether the defendant contends that any party (other than the United States) to any transaction (other than a grazing permit or lease) involving the lands embraced within the subject mining claims entered into such transaction in reliance upon the invalidity of any of the claims in suit.

A. Defendant does not know whether any third party relied upon the invalidity of the mining claims. . . .

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* * * *

[5958-A]

DEFENDANT'S EXHIBIT A.

Contest 12039

* * * *

[6010]

Department of the Interior
In The United States Land Office

At Denver, Colorado, Before the Register.

THE UNITED STATES OF AMERICA, PLAINTIFF

—*vs*—

THE INDEX SHALE OIL COMPANY, Its Agent, Trustees and Receiver, and others, DEFENDANTS

Contest No.12039, involving the Oyler Nos. 1 to 4, inclusive oil shale placer mining claims.

Deposition of Warren R.Sholes.

Be It Remembered that on this 5th day of October, 1931, the deposition of Mr.Warren R.Sholes was taken before me,

Harry A. Rogers

Clerk of the District Court of the First Judicial District of the State of Idaho,in and for the County of Shoshone, the officer who has subscribed the certificate hereto appended, and that such deposition was taken in the office of said Clerk in the County Courthouse in the City of Wallace, County of Shoshone,State of Idaho,beginning at the hour of 10 o'clock in the forenoon of said day. That before testifying,the said witness was by me sworn according to law,as more particularly appears from the certificate hereto appended, and that such witness testified as follows,in response to the following interrogatories:—

[6011] Department of the Interior In the United States Land Office

At Denver, Colorado, Before the Register.

The United States of America, Plaintiff, v. The Index Shale Oil Company, Its Agent, Trustees and Receiver, and others Defendants.

Contest No. 12039, involving the Oyler Nos. 1 to 4, Inclusive, oil shale Placer Mining Claims.

Direct Interrogatories to be Propounded to Warren R. Sholes, Esq., A Material Witness for the Plaintiff.

* * * *

[6015] Interrogatory 3: Describe generally the character of your work as a mining engineer of the General Land Office with respect to the examination of lands for purposes and classification,and of mining locations embraced in mineral applications pending before the Department of Interior,or subordinate offices and unapplied for mining locations,with respect to your duties in relation thereto.

A: With respect to the examination of lands for purposes and classifications,my examination is to determine the mineral value of the land,so that portions determined as non-mineral,could be patented to private interests under certain land grants made by Congress.

Int. # 3 A. Also to determine more exactly mineral or non-mineral portions of lands within existing reservations, where some non-mineral location or entry conflicts. As to mining locations embraced in mineral applications pending before the Department of the Interior or subordinate offices, my examination is for the purposes of determining if the U.S. Mining Laws have been complied with as to whether a valid discovery of mineral has been made and the expenditure of five hundred dollars in labor and materials has been placed thereon. As to mining locations for which patent has not been applied the examination is for the purpose of determining if those locations are bona fide,especially if they occur on lands reserved for any public purpose. The examination covers the annual assessment work,the matter of valid discovery, proper staking and validity of title.

* * * *

[6016] Interrogatory 10: State the purpose and object of the examination made by you of the Oyler claims Nos.

1 to 4,inclusive,described in a previous interrogatory.

A: To determine whether the claims were valid under the mining laws as to discovery,staking,annual assessment work,etc,with the end in view to clear title thereto, if such were not the case. The claims are embraced in a Naval Oil Shale Reserve.

* * * *

Interrogatory 12: State whether or not during the course of your examination you surveyed and tied in the position of all cuts,tunnels,shafts and other mining excavations or improvements found by you within the exterior lines of the four Oyler claims,Nos.1 to 4,inclusive.

A: I did.

* * * *

[6610]

DEFENDANT'S EXHIBIT D

Contest No. 028751

* * * *

[6651]

Secretary of the Interior
U. S. Department of the Interior
Washington 25, D. C.

Director, Bureau of Land Management
U. S. Department of the Interior
Washington 25, D. C.
Colorado Land Office

Bureau of Land Management
U. S. Department of the Interior
Denver, Colorado

Appellate Proceeding A-29560 5.22b

In the Colorado Land Office. M.E. C-028751

IN THE MATTER OF THE APPLICATION OF BARNETTE T. NAPIER, OF ARCADIA, CALIFORNIA, and GRACE A. SAVAGE, OF DOWNEY, CALIFORNIA, and JOAN L. SAVAGE, OF GRAND VALLEY, COLORADO, and MAUDE B. FARNUM, ST. CLAIR NAPIER CATLIN, WILLIAM H. FARNUM, JR. and JOHN R. FARNUM, ALL OF GLENWOOD SPRINGS, COLORADO, FOR UNITED STATES PATENT FOR THE FOLLOWING NAMED PLACER MINING CLAIMS, to wit:

The Southwest Placer Mining Claim, S½SW¼ and NW¼SW¼,
The Northwest Placer Mining Claim, N½NW¼ and SW¼NW¼,
The Northeast Placer Mining Claim, NE¼,
The Southeast Placer Mining Claim, SE¼,
All in Section 27, Township 7 South, Range 98 West of the 6th Principal Meridan.

Motion to Vacate the Colorado Land Office Manager's Decision of February 16, 1962, Or, Alternatively, To Vacate and Remand for Full Hearing After Notice of Matters of Facts and Law Relied Upon By The Manager and Asserted Against the Applicants

[6652] The applicants in the above-listed mineral patent application proceeding, by their undersigned counsel, do hereby move, petition and request that the decision of the Manager of the Colorado Land Office of February 16, 1962, be vacated, or alternatively, that it be vacated and that the matters covered thereby be ordered promptly set for a full hearing after notice of matters of fact and law asserted against applicants in compliance with the due process clause of the Fifth Amendment to the United States Constitution, the provisions of the Administrative Procedure Act, 5 U.S.C. Sections 1001 through 1011, and, in particular, with Sections 1004, 1005, 1006, 1007 and 1010, and with the published regulations of the Department of the Interior, for the reasons which follow:

I. The Decision Was Unauthorized And Erroneous As A Matter Of Law.

A. The Prior Decision Relied upon by the Manager was Rendered Without Personal Jurisdiction over the True Owners of the Mining Claims.

B. The Prior Decision was Rendered Without Subject-Matter Jurisdiction over the Questions Presented Therein.

C. The Prior Decision was Not Final, and the Contest in Which That Decision was Rendered Was Thereafter Decided and Closed Adversely to the Government.

D. The Department of the Interior Waived any Benefit that May Have Accrued as a Result of the Prior Decision.

[6653] E. The Department Has Established a Rule With the Force of Law that the Prior Decision Had No Effect on Mining Claims.

F. This Rule Has Not Validly Been Changed.

G. No Change of This Rule Can be Given Retroactive Effect Consistently with the Statutory and Constitutional Limits on the Department's Authority.

H. The Manager Rendered the February 16, 1962, Decision in Excess of his Authority Under the Department's Own Rules, the Administrative Procedure Act, and the Fifth Amendment, since He Purported to Adjudicate the Validity of Applicants' Mining Claims.

I. The Reasons and Authorities Already Presented in the Statements of Reasons and Briefs on Appeal in the Proceedings Before the Director of the Bureau of Land Management and the Secretary are Incorporated Herein by Reference.

II. The Department Of The Interior's Own Published Regulations Were Violated By The Failure To Provide A Hearing On The Questions Decided In The Manager's February 16, 1962, Decisions.

The Department's published rules provide for the initiation of Government contests for causes affecting the legality or validity of any mining. It is apparent from an analysis of these rules, contained in Subtitle B of Title 43 of the Code of Federal Regulations, that all causes affecting [6654] the basic validity of a mining claim must be presented in a contest or a judicial suit,

and that a land office manager lacks authority to decide such causes in contested cases. It is true that a manager's authority does not seem to be spelled out precisely in the published rules. However, the limits of his authority are implicit in these rules and in the governing statute.

Section 28 of Title 30 of the U. S. Code contains the statutory procedural requirements for obtaining patent. Under this section and the applicable regulations, primarily 30 C.F.R. Sections 185.38-.72, Sections 185.78-.83, an application for patent must be filed in the land office having jurisdiction over the land for which a patent is desired. The statute and these regulations specify in considerable detail what documents and proofs must be submitted by a patent applicant, and obviously contemplate that a manager of the land office will decide in the first instance whether the submitted documents and proofs meet the requirements of the statute. They also contemplate that if a manager decides the submitted proofs are in the proper form and satisfy the statutory and regulatory requirements, he will process the application and upon request issue a patent, provided that there is no pending adverse charge or objection to the validity of the applicant's mining claims or locations. See, e.g., 43 C.F.R. Sections 185.60, 185.62. When such adverse charges or objections are raised and are contested, a manager clearly is not to pass [6655] upon the merits of the challenges but is required to refer adverse claims to judicial proceedings and contests to hearing examiners. See, e.g., 43 C.F.R. Sections 185.80, 221.65 (b).

The basis of the February 16, 1962, decision of the Land Office Manager in Denver was by no means a question of the formal adequacy or sufficiency of the patent applications which he rejected. As demonstrated in part IIIB, infra, it was a question of the validity of the placer mining claims themselves, a question which he was not called upon or authorized to decide.

Accordingly, the Department's own rules required that the questions passed upon by the Manager should not and could not properly have been decided by him. Compliance with the rules would have required that a contest be

initiated in order to determine the effect upon the applicants' mining claims of the default decision in Contest No. 12972. See 43 C.R.F. Section 221.67. Such a contest would have been instituted by the filing of a complaint, which would have stated, among other things, the facts and law constituting the grounds of contest. The applicants then would have been entitled to file an answer to the complaint and the Manager would have been required to refer the case to an examiner for a hearing (unless all parties waived a hearing). See 43 C.F.R. Sections 221.64-65. The plain failure to follow the Department's own rules has prejudiced the applicants and requires that the Manager's decision be vacated and a proper hearing be accorded applicants before the question [6656] of the validity of their mining claims is decided.

III. The Administrative Procedure Act Applied To The Actions Of The Colorado Land Office Manager And The Provisions Of That Act Required That The Adjudication He Made Be Determined On The Record After Timely Notice And Opportunity For An Appropriate Hearing.

A. The Administrative Procedure Act Applies to Proceedings to Determine the Validity of Mining Claims. The Department has held in United States v. O'Leary, 63 I.D. 341 (1956), that the due process clause of the Fifth Amendment requires a hearing in all cases adjudicating the validity of a mining claim, and that "the hearing requirements of the Administrative Procedure Act are applicable to hearings on the validity of mining claims." (At 345.) This decision was correct and was adopted in both respects by the United States Court of Appeals for the Ninth Circuit in Adams v. Witmer, 271 F.2d (1958). Moreover, the Department's regulations recognize the applicability of the Act to the Department of the Interior, see 43 C.F.R. Sections 221.51-221.77, as did Reorganization Plan No. 3, Sections 1 and 2, effective May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, (see 5 U.S.C. Section 481, note following), which, in transferring all functions of the Department of the Interior directly to the Secretary of the Interior, expressly ex-

cepted the functions vested in the hearing examiners by the Administrative Procedure Act.

[6657] B. The Proceedings Presently Under Review Purport to Adjudicate the Validity of Mining Claims. Since it is established by Department, judicial, and congressional decision that the hearing requirements of the Administrative Procedure Act apply to proceedings to adjudicate the validity of mining claims, the chief question here is whether the present proceedings—or more properly the decision rendered by Manager Andrus—is such an adjudication. The Manager's decision rests in the first instance on a certain cited decision rendered by the Department in 1931. In relying as he did on the earlier decision as the basis for application of a supposed Department policy of finality, the Manager necessarily both asserted and determined their original and continuing validity.

The precise question on this motion therefore is whether a proceeding to determine the validity and effect of a decision holding mining claims invalid is itself an adjudication. In these cases, where the prior adjudications of invalidity were embodied in judgments or decisions entered on default, the answer must clearly be in the affirmative. A determination inter partes of the validity of an earlier default judgment requires decision for the first time of matters of fact and law which were not and could not have been decided in the default proceeding. It is elementary constitutional law that a proceeding on default is valid only if service of process was properly accomplished so that personal jurisdiction existed, and only if the decision-making body possessed power and authority over [6658] the matters in issue. It is equally elementary constitutional law that a decision rendered on default cannot conclude those issues; they are open when the benefit of the default decision is subsequently first claimed by either party against the other.

It is apparent that what the Manager has attempted to do in his decision is to conclude the very matters of fact and law which were not and could not have been decided in the original proceeding because of the absence of the applicants' predecessors in title, and which are

indispensable to its effectiveness. Without a hearing, and therefore once again in their absence, he has purported to adjudicate the facts and law against them.

Had there otherwise been room for doubt that the Manager's decisions purport to conclude not only matters of law but also conclude questions of fact, the Solicitor's letter of May 20, 1963, to Cleary, Gottlieb, Steen and Hamilton, counsel for Tell Ertl and others, in Appellate Proceeding A-29560, resolved all doubt. In the last paragraph of that letter, the Solicitor states that ". . . the above-numbered applications of your clients have been consolidated in this proceeding with certain others involving *identical questions of fact and law.*" (Emphasis supplied.)

We believe that the Solicitor's letter gives special emphasis to the fundamental error in the Manager's decisions. It reveals clearly that the very same agency which in 1931 purported on its own motion and in default of the appearance of [6659] applicants' predecessors to determine its own jurisdiction, has now, despite the fact that applicants are here, purported to determine those issues without affording them notice and an opportunity to be heard. Despite its own independence of the interested parties, not even the very same court which rendered a default judgment would regard its original determination of the adequacy of jurisdiction as precluding the defaulted party when the judgment is subsequently asserted against him. Applicants find it inexplicable that an officer of the Department, which was the very agency which first asserted the invalidity of these mining claims, should have thought that he had the power to conclude these issues without affording applicants notice and an opportunity to be heard.

While it is elementary that applicants would have been entitled to compliance with the Administrative Procedure Act, even if the only questions involved were questions of law (whether or not within the special administrative competence of the Department as a law maker), it is plain that on the narrowest possible view of the issues which the Manager decided there were complex questions of historical jurisdictional fact. Moreover, applicants are

not confined to the narrowest possible view. A great variety of issues of fact and law would have been put in issue had notice and hearing been afforded it, and those matters will be in issue at the hearing which it now requests. A brief partial summary of the essentially factual propositions put in issue by the Manager's decisions and which [6660] will be in issue in the hearing now requested is attached hereto as Exhibit A.

C. The Decisions of the Manager Were Rendered in Violation of the Administrative Procedure Act. It requires no argument to establish that the Manager's decision adjudicating applicants' mining claims to be invalid was rendered in violation of substantially every provision of the Administrative Procedure Act. Not only does Section 5 of the Act require that there be a hearing with timely notice of its location, it requires further that notice be given (inter alia) of "the matters of fact and law asserted." The requirement that applicants be given full and fair notice of the claims asserted against them is of constitutional origin and dignity.

The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. Morgan v. United States, 304 U.S. 1 (1938).

Moreover, the Act requires that the hearing be conducted not by an officer of the Department of the Interior, such as the Manager, but rather by a hearing examiner appointed in accordance with Section 11. Decisions such as the Manager's wholly defeat both the independence of tribunal and the separation of functions contemplated by the Act.

[6661] The list of violations of the Act could be greatly lengthened, but to do so would serve no purpose here. The Department is fully familiar with the requirements

of the Act. It has to all appearances intended to comply with them in its regulations (discussed in Part II, supra) governing "Private Contests and Protests" and "Government Contests," 43 C.F.R. Sections 221.51 through 221.76.

D. The Rendering of the Manager's Decision Without Notice and Opportunity for a Hearing Cannot Be Justified Under the Administrative Procedure Act or the Department's Regulations as Permissible "Official Notice." Applicants who have had no notice or adversary have no way of knowing by what arguments the Department would seek to justify the Manager's failure to comply with its proper hearing procedures. Because administrative agencies familiarly take limited official notice of matters contained in their records, it has seemed to us possible at least that the Manager has fallen into error by assuming that he could look to records on these basic questions, make the determinations that are here disputed and thereafter comply with the Act by affording the applicants "on timely request . . . an opportunity to show the contrary." A.P.A. section 7(d), 5 U.S.C. Section 1006(d); see 43 C.F.R. 221.100.

Section 7 of the Act and Section 221.100 of the Regulations cannot be so interpreted. Both contemplate the taking of official notice and subsequent refutation only where in the language of Section 7, "any agency decision rests on [6662] official notice of a material fact not appearing in the evidence in the record . . ." Here we have no record, no evidence and no hearing. To justify what the Department has done on official notice grounds would be to assert that the narrow official notice exception (Section 7(d)) from the general requirement that all material evidence be properly introduced at the hearing modifies the fundamental requirement of Section 5 (a) that persons entitled to a hearing shall be timely informed of its time, place, nature, authority, and—most important here perhaps—the matters of fact and law asserted. Even now an opportunity to rebut would leave applicants uninformed of the claims of a "party" which has yet to make itself apparent, and therefore unequipped to make any adequate defense.

E. The Procedural Defects Under the Department's Regulations and the Administrative Procedure Act in the Manager's Decision Cannot be Cured Without Reversal or Vacation of Them. Section 221.76 of the Department's Regulations and Sections 5(c) and 8(a) of the Administrative Procedure Act both require that the initial decision in any case of adjudication be made by the hearing examiner who presided at the hearing or on the record there made. It follows without more that applicants cannot be remitted to any hearing which is not de novo, and the Manager's decision, if not reversed, must be vacated.

IV. The Due Process Clause Of The Fifth Amendment Requires That Adequate Notice Be Given And A Hearing Be Held Before A Final Order Adjudicating Applicants' Mining Claims To Be Invalid Can Be Entered.

[6663] Although it is applicants' position that the Department's own rules and the Administrative Procedure Act preclude affirmance of the Manager's decisions and there should be no need to reach Constitutional questions, it is apparent that the due process clause assures applicants and the other oil shale claimants much more in the way of procedural fairness than they have so far been accorded. There is, of course, a relationship between the requirements of the Administrative Procedure Act and those of due process. As the Supreme Court said in United States v. Morton Salt Co., 338 U.S. 632, 644 (1950), the Act was framed to guard against excesses of administrative zeal, and imposed procedural standards that were thought by its draftsmen to be much stricter than those imposed by the due process clause. Thus, it seems clear that any procedural irregularity that raises a significant Constitutional question must raise a substantial question whether the Administrative Procedure Act has been complied with. In any event, there is little doubt that affirmance of the Manager's decisions would violate the due process guaranty.

The basic requirements of procedural due process for decision of an essentially adjudicatory question have been concisely stated by Chief Justice Hughes in Morgan v. United States, 298 U.S. 468, 480-81 (1936):

There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be [6664] treated as evidence which is not introduced as such. . . . The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the Tryer of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

Accord, Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793, 799-800 (1945); Interstate Commerce Commission v. Louisville and Nashville RR, 227 U.S. 88, 91, 93 (1913).

The applicants have so far not only been denied a hearing, they have been denied the almost equally important Constitutional right (which is usually obtained in connection with a hearing) of notice of the matters of fact and law asserted against them, which notice should be provided a reasonable amount of time before a decision is rendered. See e.g., Crowell v. Benson, 285 U.S. 22, 47-48; United States v. Libby, McNeill & Libby, 107 F. Supp. 697 (D. Alaska 1952); Annotation, 99 L. Ed. 460.

The applicants have been substantially prejudiced by the failure of the administrative proceedings that have occurred up to the present to observe the minimal guaranties inherent in Constitutional due process. Lacking an adversary, [6665] they have also lacked notice of the matters of law and fact which have been asserted and determined against them. No hearing has been held and no evidence has been properly introduced to sustain the decisions of the Manager. Moreover, no opportunity has been provided for the applicants to present evidence in their own behalf. They have had no opportunity to question, analyze or rebut—or even to know—what facts the

Manager relied upon in ruling against them. Only if the Secretary now moots this request for a hearing by outright reversal of the Manager's decisions, can this request for a hearing properly be denied.

V. This Motion Should Be Granted By The Secretary.

The issue of invalidity of the decisions rendered by the Manager is before the Secretary in the pending consolidated appeals. This motion is the appropriate method for the seeking and granting of the subject relief because there is no provision made in the Department's regulations for applications for hearings after decisions such as those moved against. 43 C.F.R. Section 221.6 is inapplicable because by its terms it applies to limited factual hearings "on appeals" and the hearing requirements here stated cannot be satisfied except by a hearing in every sense de novo, and because a Field Commissioner before whom hearings "on appeal" are to be held is not a qualified hearing examiner since the function of the Field Commission was transferred to the Secretary by Reorganization Plan No. 3 as set forth above.

[6666] The motion should be granted as to either of its alternative prayers for relief for reasons also of substantial fairness since such a grant would expedite the final determination of the matters in question.

Lesher, Schmidt & Van Cise

By Richard M. Schmidt Jr.
425 Midland Savings Building
Denver 2, Colorado
Attorneys for Applicants

[6667]

EXHIBIT A*

Offer of Proof

Essentially Factual Propositions That A Litigant Wishing To Support The Andrus Decision of February 16, 1962, Should, Among Other Things, Have To Establish To Make Out A Prima Facie Case Of Invalidity Of The Oil Shale Claims Involved Therein.

1. For a litigant to show that any prior default decision by its own force invalidated an oil shale claim, he must show,[1] among other things, (1) who the true owners of the claims were at the time service of process was attempted, (2) that the true owners were served with process, (3) that service was effected in accordance with the then applicable provisions for service,[2] (4) that the tribunal rendering the decision had subject-matter jurisdiction or administrative adjudicatory authority over the matters raised by the complaint before it, which includes a showing of precisely what was alleged, (5) that the decision relied upon was a final decision to which the rendering tribunal intended to give conclusive effect, rather than an essentially interlocutory order that was subject to being disregarded later by that tribunal.

[6668] 2. For a litigant to show there has been acquiescence[1] in a decision on the part of claimants or their

[1] Under Section 7(c) of the Administrative Procedure Act the proponent of an order has the burden of proof, a rule consistent with judicial practice. But regardless of who bears the burden of establishing the propositions listed hereafter in the text, those factual propositions would be at issue at the adjudicatory hearing we request.

[2] A closely related essentially legal question is whether the applicable provisions for service were provided by the Rules of Practice, Circular No. 460, or some other directive.

[1] "Acquiescence" is not a well-defined legal doctrine, and the factual propositions one relying upon a charge of acquiescence must establish depend of course on how "acquiescence" is defined. The exact contours of the factual issues that would be presented at a hearing cannot now be determined, since the Government has not asserted or explained what the Manager means by "acquiescence." If "acquiescence" as used in the February 16, 1962 decisions

predecessors in title and that during that acquiescence rights have been acquired which should preclude assertion of the oil shale claims, he should have to show, among other things, (1) that the decision was made known to the true owners of the claims, (2) that the true owners were under a duty to object to the decision, (3) that the litigant had, in good faith and for a valuable consideration, acquired an interest in the lands covered by the claims, (4) what sort of interest the litigant had acquired, (5) that the litigant's interest was inconsistent with the interest asserted by the oil shale claimants, (6) that the oil shale claimants or their predecessors actually knew that the litigant was acquiring such an interest and had an opportunity to inform the litigant of the oil shale claim before the litigant parted with whatever consideration was paid for his interest,[2] (7) that the litigant was unaware of an assertion of the oil shale claims when he acquired his interest in the land.

[6669]

Essentially Factual Propositions That Claimants Presently Expect To Be Able To Establish In Re-Buttal Of Any Prima Facie Case.

1. If after hearing of the facts and law the personal and subject-matter jurisdiction of the tribunal rendering the decision in Contest No. 12972 is established, the oil shale claimants expect to be able to establish, among other matters (1) that the Commissioner of the General Land Office and the Secretary of the Interior expressly decided and agreed in June of 1930 that all prior proceedings for failure to do assessment work against claimant's oil shale claims (which included default decisions

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can possibly have the effect of destroying possessory title to land, or of justifying an administrative policy of "finality" proof of acquiescence should involve at the very least establishing the factual propositions set forth in the text immediately following.

[2] A related legal issue is whether the effect of such a course of conduct would be to destroy a mining claimant's entire possessory title, would simply be to subject that title to whatever interest the other party had acquired in the land, or would be to leave the claim unimpaired.

in 1928 against all the claims in their entirety) were of no effect and were void, (2) that in tacit recognition of the nullity of the prior proceedings, new Government challenges for failure to do assessment work, were directed and made against the claims previously defaulted, such challenges allegedly having been made before resumption of assessment work, (3) that the Commissioner and the Secretary intended to and did waive any benefit that might have accrued to the Government as a result of the default decisions in 1928 and established the invalidity of the prior decisions, (4) that Contest No. 12972 was expressly decided and closed adversely to the Government in 1935, (5) that authorized officers of the Department in 1935 and thereafter intended to and did waive any [6670] benefit that might have accrued to it as a result of default decisions in the contests (6) that the Department of the Interior has by a long and consistent (until February 16, 1962 decision) course of conduct established a rule with the force of law that all the government contests which charged only failure to do assessment work were of no effect regardless of default decisions therein, (7) that this rule or practice was widely known in the areas containing oil shale deposits involved herein, (8) that this rule has not been changed in accordance with the Federal Administrative Procedure Act,[1] (9) that the present claimants who acquired their interest in the claims after the contest was closed in 1935 are bona fide purchasers without notice of the default decisions, (10) that since 1935 the Government has induced the claimants and their predecessors to make substantial expenditures on the oil shale claims, for the benefit of Government geological and mining studies, and that implicit in such inducements was a recognition of the validity of the oil shale claims, (11) that the Government has lost any undivided interest in the claims it might have acquired, by its failure to contribute toward the assessment expenditures made by the claimants, which

[1] A related legal question is whether a change of this rule could be given retroactive effect consistently with the statutory and constitutional limits on the Secretary's power.

contribution was timely demanded in accordance with 28 U.S.C. Section 30, in a valid judicial proceeding in the Colorado courts, which proceeding vested, in accordance with federal law, full possessory title in those who had made the assessment work expenditures or who made timely contribution thereto.

[6671] 2. If a prima facie showing is made out of sufficient acquiescence to warrant subjecting the oil shale claims to an interest or interests of an adverse litigant, the claimants expect to be able to establish (1) that since 1935 claimants and their predecessors have made substantial expenditures to improve and develop the oil shale claims and that their activities in developing these claims were open and notorious and matters of common knowledge, (2) that the lands claimed have, at all times since the locations were made, been regarded as valuable for oil shale by claimants and their predecessors and by the Government as well, (3) that the 1927-35 contest proceedings over failure to do assessment work have at all relevant times been regarded by all parties concerned as void, (4) that no one could justifiably rely on the default decisions in those contests, since, among other things, the Department of the Interior repeatedly stated that the decisions were void and of no effect on unpatented placer mining claims and since the Department issued patents to many thousands of acres of oil shale land to claimants whose interests had been declared null and void in the abortive contest proceedings, (5) that no parties who assert an interest in the oil shale lands have or claim any valid interest in the oil shale mineral deposits, (6) that all such persons actually knew when they acquired their interests that the land was subject to unpatented oil shale mining claims, (7) that the oil shale claims have been properly recorded and matters of public record in Colorado since 1920 or [6672] 1919 and that all those who subsequently acquired interests in the lands had constructive notice of the oil shale claims, (8) that there is no necessary inconsistency between the oil shale claimants' intended use of the lands, commercial produc-

tion of oil from oil shale, and the present uses of the lands by others who claim an interest in this.

Lesher, Schmidt & Van Cise

By Richard M. Schmidt Jr.
425 Midland Savings Building
Denver 2, Colorado
Attorneys for Appellants

* * * *

[6774] To: Land Office Manager

United States
Department of the Interior
Bureau of Land Management
Colorado State Office
Area 3

Mineral Report

Mineral Patent Application
of
Maude B. Farnum, et al.,
for the
Southwest Oil Shale Placer Mining Claim
Northwest Oil Shale Placer Mining Claim
Northeast Oil Shale Placer Mining Claim
Southeast Oil Shale Placer Mining Claim
(Title)
Lands Involved
Garfield County, Colorado
6th Principal Meridian

T. 7 S., R. 98 W.,
Sec. 27.

cc: Director, U.S.G.S.
Washington, D. C.

January 27, 1960 (Date)

By Ralph G. Spengler
Warren R. Sholes
James McIntosh
Approved
Valuation Engineers (Mining)

J. Elliott Hall
Land and Minerals Officer

[6775]

* * * *

Recommendations: 1. The E½E½NE¼ should be withdrawn from the patent application. 2. All else being regular, the claims should proceed to patent.

* * * *

[6776] These claims and the Last Chance group (previous locations on the same land) were contested by the Government under the following charge:

"That annual assessment work to the value of $100 was not performed upon each or any one of the Northwest, Northeast, Southeast and Southwest Oil Shale Placers for the year ending July 1, 1931, and that work had not been resumed on said claims July 6, 1931, when challenges to the validity thereof were posted thereon on behalf of the United States."

[6777] No other charges were used. The charge was answered and a hearing was held in Glenwood Springs. The charge against the Southwest Placer Claim was dismissed. The remaining claims were declared null and void, by letter "N" 1424895 CRB, dated December 28, 1931—Contest 12972 (United States vs Mrs. B. T. Napier, et al.)

The Last Chance Nos. 1 to 4, inclusive, were declared null and void to the extent of the interests of eight of ten parties of record by letter "N" of September 9, 1931, 1406941 WST—Contest 12615.

* * * *

Clerk's Note: Defendant's Exhibit K, Docket Sheet, Minutes of Proceedings, etc., is in a separate Exhibit Book.

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[7486]

DEFENDANT'S EXHIBIT L

The following material is attached:

1. The prefatory page and pages 21, and 22, from a Synopsis prepared for the opening meeting of the Department of the Interior Oil Shale Advisory Board.

* * * *

[7488]

United States Department of the Interior

The Oil Shale Policy Problem

A synopsis prepared for the opening meeting of
the Department of the Interior
Oil Shale Advisory Board
July 7, 1964

* * * *

[7515]

Description of ownership status of the
Green River oil shales

The oil-shale deposits that are currently of primary interest in the United States are those in the Green River Formation, which extends over large areas of Northwestern Colorado, East Central Utah and Southwestern Wyoming (Figure 4). The shaded areas represent approximately 2,600 square miles of Green River Formation in Colorado, 4,700 square miles in Utah and 9,200 square miles in Wyoming. Although the area in Colorado is smaller than that in either of the other two States, the oil-shale deposits in Colorado are thicker and richer.

According to recent estimates the shale oil potential of the deposits in the three states is about two trillion barrels. The estimated oil potential of the principal oil-shale deposit in the Colorado Piceance Creek Basin includes about 500 billion barrels in shale yielding more than 25 gallons per ton and about 800 billion barrels in shale yielding between 10 and 25 gallons, or a total of 1.3 trillion barrels in combined high and low grade oil shale.

The estimates represent the amount of shale oil in place as indicated by computation from assays of samples sections.

To date, investigations of Utah's oil-shale deposits have not been nearly as comprehensive as those of the Colorado deposits, and the deposits in Wyoming have been explored least of all. Estimates of oil in place in shales assaying 25 gallons per ton and at least 15 feet thick in Utah and Wyoming are 120 billion barrels and 43 billion barrels respectively. In the State of Utah oil shales which have an assay above 15 gallons per ton that are at least 15 feet thick are estimated to represent 320 billion barrels of oil in place. In Wyoming, oil shales in minable beds richer than 10 gallons per ton are currently estimated at 370 billion barrels. The shale oil in place in the combined high and low grade oil shales in the three States comes to the previously stated total of about two trillion barrels.

In Colorado, the principal oil-shale measures occur within a 1,350 square mile area of the Piceance Creek Basin (Figure 5). The areas facing the Colorado River and its tributaries, and to a lesser extent Piceance Creek and other stream beds where the shale outcrops, are privately-owned. However, virtually all of the central portion of the Basin is federally-owned. Although the oil shales in the center of the basin are buried under hundreds of feet of overburden, nearly 2,000 feet of these beds average 25 gallons per ton. Oil-shale measures of [7516] this richness become progressively thinner toward the Basin margin. Near the outcrop facing the Colorado River, the beds averaging 25 gallons per ton are less than 100 feet thick.

Of the entire 1,300,000 acres of land in the oil-shale area in Colorado, 582,000 acres (including Naval Reserves) are federally-owned, 380,000 are privately-owned, and 338,000 are lands in unpatented mining claims. Approximately 1,000,000 acres are underlain by oil-shale deposits and the remainder is contiguous non-shale bearing land, principally the areas of stream valleys between oil-shale outcrops. Virtually all of the central portion of the Piceance Creek Basin is federally-owned land. Federal

oil shale averaging at least 25 gallons per ton and 15 feet or more thick probably average about 1,000 feet in thickness, where the shale of this grade on privately-owned land probably averages a little over 100 feet.

Of this previously mentioned 1.3 trillion barrels of oil in deposits containing 10 gallons or more of oil in the Piceance Creek Basin the privately-owned oil shale represents about 100 billion barrels of shale oil and the unpatented mining claims about 100 billion barrels. The remaining lands are federally-owned and contain deposits of about 1.1 trillion barrels in place. Based upon a shale grade of 25 gallons per ton the oil potential would be half of these quantities.

* * * *

[7794]

DEFENDANT'S EXHIBIT S

The Triumph Nos. 22 and 23, the F.D. No. 7, the J.D. Nos. 1, 2, 3 and 5 oil shale placer mining claims were located in April of 1918.

In May of 1920 Summers made application for an enlargment homestead entry and for an additional stock raising homestead entry. The entries were allowed with mineral reservations. Combined final proof was submitted in 1923.

The holders of the above mining claims protested the granting of patents on the entries to Summers on the ground that the entries were made on lands covered by prior valid mineral locations.

After extensive proceedings within the Interior Department a decision was issued on September 30, 1927. The decision found that the mining claims were supported by a valid discovery and held the homestead entries for cancellation because made upon lands covered by prior valid mineral locations.

By a decision dated July 1, 1931, the oil shale placer mining claims were declared null and void on an assessment work charge.

By a decision dated October 14, 1931, Summers was permitted to file an application for the reinstatement of his cancelled homestead entires, and by a decision of November 20, 1931, the homestead entries were reinstated inasmuch as the conflicting mining claims had been declared null and void for failure to perform assessment work.

The homestead entries were patented with a reservation of minerals in 1932.

The following material is attached:

* * * *

4. The decision of November 20, 1931, reinstating the homestead entires.

* * * *

[7814]

United States Department of the Interior General Land Office Washington Nov 20 1931 Jones Goerner McGee Altizer (illegible) Obenchain

In reply please refer to Denver 032575-6"N"AKJ

George L. Summers. (Oil shale.) Promulgating departmental decision dated October 14, 1931; cancelled homestead entries involved,reinstated with reservation of minerals.

Register, Denver, Colorado.

Sir: Under date of June 3, 1931, George L. Summers filed application for reinstatement of his former homestead entries Denver 032576, embracing the S½ NW¼, N½ SW¼ Sec. 1, S½ NE¼, N½ SE¼ Sec. 2, and Denver 032575, embracing lots 3, 4, S½ NW¼ Sec. 2, lots 1, 2, 3, SE¼ NE¼ Sec. 3, all in T. 5 S., R. 97 W., 6th P. M.

These entries were allowed May 17, 1920, and January 28, 1921, respectively, with mineral reservation under the act of July 17, 1914 (38 Stat. 509), as to the first entry, and under the act of December 29, 1916 (39 Stat. 862) as to the second entry. Final proof in support of the entries was submitted May 22, 1923. [stamp] Return this copy to G. L. O. when original signed.

[7815] The entries, after extended hearings upon protests filed by J. D. Freeman and the Standard Shales Products Company, United States intervenor, were cancelled by letter "N" of October 14, 1927. This action was taken in pursuance of departmental decision dated September 30, 1927, which found and held the entries to be in conflict with certain prior valid and subsisting oil shale placer claims of the aforesaid protestants, known as J. D. Nos. 1, 2, 3, 5, F. D. No. 7, and Triumph Nos. 22 and 23.

Adverse proceedings against these claims, among others, have since been directed by this office, on the ground that assessment work for the year ending July 1,1929, had not been performed on or for the benefit of the claims.

The applicant, Summers, in view of this action, and on the assumption that the said claims would shortly be cancelled, asked that his application for reinstatement be accepted and noted on the records of both your office and this office, and that when the claims should be finally cancelled the said cancelled homestead entries be reinstated and the final proof accepted.

[7816] The application was, by letter "N" of June 18, 1931, rejected. This action, on appeal, was modified by the Department by decision dated October 14, 1931,copies inclosed, which concluded as follows:

"The register of the local office should therefore be instructed to permit the filing of the application for reinstatement to await the outcome of the proceedings against the mining locations. Should the charge as to any or all of the above named locations be finally sustained, the application will be considered as initiated as of the date of the notation thereof on the local records, and subject to applicable rules governing reinstatement of entries,reinstatement of the entry or entries of Summers may be allowed for the land embraced in any of the above named locations that are adjudged to have lapsed by failure to resume assessment work thereon or for their benefit prior to the service of notice of the proceedings pending against them. The application should, of course, be rejected as to all tracts covered by claims where delinquency is not established.

"The Commissioner's decision is therefore modified to conform to these views and the case is remanded for action accordingly."

As you have already been advised, all of the said mining locations were finally declared null and void by letters "N" of June 4, 1930, and July 1, 1931. The lands, however, had in the meantime been withdrawn from lease or other disposal by Executive Order of [7817] April 15, 1930, subject to valid existing rights.

The records show that Summers filed satisfactory final proof on the entries showing full compliance with the homestead laws. His claims were initiated in apparent good faith long prior to the withdrawal, and he had earned patent under both entries and would have received patents therefor but for the prior placer mining locations, which are now out of the way. Therefore, he had prior to the withdrawal acquired equitable claim to the land which may be considered as a valid existing right within the saving clause of the withdrawal order. Homestead entries 032575 and 032576 are therefore hereby reinstated.

So note your records and advise Summers, transmitting to him a copy of said decision.

Very respectfully,

Thos. C. S. Farrell
Acting Commissioner.

Approved: Nov 20 1931
Sgd. Ray Lyman Wilbur
Secretary.

mc

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[7833]

DEFENDANT'S EXHIBIT U

On July 19, 1927, an application was filed for an oil and gas prospecting permit covering, among other lands, the S½NW¼ and S½NE¼ of Section 4, Township 5 South, Range 95 west. An oil and gas prospecting permit covering the above lands and others was issued on December 8, 1927.

The Lucy Agnes No. 2 oil shale placer mining claim covering the S½N½ of Section 4, Township 5 South, Range 95 West, was declared null and void on an assessment work charge by a decision dated August 18, 1930.

The oil and gas prospecting permit continued in existence and was exchanged for an oil and gas lease covering, among other lands, the S½NW¼ and the S½NE¼ of Section 4, Township 5 South, Range 95 West. The oil and gas lease was issued December 31, 1938.

The following material is attached:

1. The decision of August 18, 1930, declaring the Lucy Agnes No. 1 and No. 2 oil shale placer mining claims null and void.

* * * *

[7834] 4x 1x C.F.D. United States Department of the Interior General Land Office Washington Aug 18 1930

In Reply Please Refer To 1282120 "N" UEC.

United States vs. Universal Shale Oil Company

Oil shale. R. Contest 12372. Locations null and void. Case closed.

Register, Denver, Colorado.

Sir: By office letter "N" of May 1, 1930, adverse proceedings were directed against the Lucy Agnes No. 1, N½ N½ and Lucy Agnes No. 2 S½ N½ Sec. 4, T. 5 S., R. 95 W., 6th P. M., oil shale placers upon the charge:

"That annual assessment work to the value of $100.00 was not performed upon each or or any one of the Lucy Agnes Nos. 1 and 2 oil shale placers for the year ending July 1, 1929, and that work has not been since resumed."

Notices of the charge issued by you and were served on four of the trustees of the company May 9, 1930. In your letter of July 1, 1930, you state that no answers were filed within the time allowed.

The failure of the contestee to file answer denying the charge is taken as an admission by it of the truth thereof, in view of which the Lucy Agnes Nos. 1 and 2 oil [7835] shale placers are declared null and void and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed.

Advise the contestee by ordinary mail.

Very respectfully,

(Sgd) C. C. Moore
Commissioner.

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* * * *

Clerk's Note: Defendant's Exhibits W, X and Y are in a separate Exhibit Book.

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* * * *

[8226]

DEFENDANT'S EXHIBIT KK-

Term Rental Permits and Billings for Grazing Privileges and Licenses for Grazing Privileges

* * * *

[8480]

DEFENDANT'S EXHIBIT E

Colorado State Office 339 New Custom House P. O. Box 1018 Denver 1, Colorado

Dr. Tell Ertl Grand Valley, Colorado Dec 16 1960

Dear Mr. Ertl: This acknowledges receipt of your letter of December 12, 1960.

We have no jurisdiction over an individual's decision to submit, or not to submit, a mineral patent application. This is the prerogative of the individual concerned.

* * * *

(4) In your reference to "Assessment Work," you apparently mean the $500.00 statutory improvement requirement of the mining law since assessment work to hold the claims is no longer necessary under the "Krushnic Decision," which no doubt is familiar to you.
[8481] However, the question of whether a patent application is submitted is a decision that must be made by the individual concerned.

Sincerely yours,

Lowell M. Puckett
State Eupervisor

(Signed) J. Elliott Hall
Acting State Supervisor

Director (2)

cc: L&M case files
L&M reading
SO reading
Kuehnel/mb

CASE NO. 9582

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Pleas and proceedings before the Honorable William E. Doyle, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

JOSEPH B. UMPLEBY, and WASATCH DEVELOPMENT CO., PLAINTIFFS

vs.

STEWARD L. UDALL, Secretary of the Interior, DEFENDANT

No. 8685, Civil

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[1]

COMPLAINT

Complaint for Declaratory Judgment and Relief in the Nature of Mandamus

Plaintiffs, Joseph B. Umpleby and Wasatch Development Co. for cause of action herein, complain of the defendant and allege:

1. Plaintiff Joseph B. Umpleby is a citizen of the State of Texas. Plaintiff Wasatch Development Co. is a corporation incorporated under the laws of the State of Colorado.

2. The defendant, Stewart L. Udall, here sued in his official capacity, is the duly qualified and acting Secretary of the interior of the United States, having his official place of business at the seat of government in Washington, D. C., and as Secretary is charged with the administration of the laws of the United States relating to the public lands.

3. The matter in controversy, exclusive of interest and costs, exceeds in value the sum of $10,000; involves the

construction of certain laws of the United States under which the plaintiffs claim vested rights in and to certain oil shale mining claims located in Garfield County, Colorado; and further involves [2] the duty of the defendant to faithfully observe the pertinent acts of Congress pertaining to the mining laws, and more particularly to require defendant to issue land patents to plaintiffs to the mining claims involved in this action.

4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § § 1361, 1391 (Action to compel an officer of the United States to perform his duty), 28 U.S.C. § § 2201, 2202 (Declaratory Judgments).

First Claim for Relief

1. That on September 8, 1959, Joseph B. Umpleby and Wasatch Development Co. filed application for mineral patent (Colo. 030979) on Carbon Nos. 1 to 5 oil shale placer mining claims, being the S½S½ of Sec. 33; N½ S½ of Sec. 33; S½N½ of Sec. 33, N½N½ of Sec. 33; and the N½N½ of Sec. 32; and the Elizabeth Nos. 1, 2, 4 to 12 oil shale placer mining claims, being the S½S½ of Sec. 36; N½S½ of Sec. 36; N½N½ of Sec. 36; N½ N½ of Sec. 35; S½N½ of Sec. 35; N½S½ of Sec. 35; S½S½ of Sec. 35; S½S½ of Sec. 34; N½S½ of Sec. 34; S½N½ of Sec. 34; N½N½ of Sec. 34; all in Township 4 South, Range 97 West of the Sixth P.M., Garfield County, Colorado.

2. That on June 26, 1929, adverse proceedings were initiated against Joseph B. Umpleby, et al. on the above claims (Contest No. 12029), alleging that the assessment work was not performed on or for the benefit of the claims for the years ending July 1, 1927 and July 1, 1928.

3. That on or about July 23, 1929, an answer was filed by Joseph B. Umpleby, et al. to the charges made in the contest, [3] alleging that under the decisions of the courts and the Department of the Interior, the performance of assessment work was unnecessary so far as the United States is concerned, and that the defaults mentioned were not available to the United States.

4. That on June 9, 1930, the contest proceedings were amended charging that the annual assessment work to the

value of $100 was not performed upon the claims for the year ending July 1, 1929.

5. That on or about July 1, 1930, an answer was filed by Joseph B. Umpleby, et al. to the amended charges alleging that under the decisions of the courts and the Department of the Interior, the performance of assessment work was unnecessary so far as the United States is concerned, and that the defaults above-mentioned are not available to the United States. The contestees further alleged that no third person, by applying for a lease or otherwise, has, at any time, secured or attempted to secure any right to the lands covered by the said oil shale claims, during the said period of default in assessment work.

6. That on July 23, 1930, a decision was rendered against Joseph B. Umpleby, et al. by C. C. Moore, Commissioner, citing the Krushnic Case (280 U.S. 306) as legal authority for the Department to contest the claims for failure to do assessment work as alleged in the contest.

7. That on August 28, 1930, Joseph B. Umpleby, et al. appealed the decision to the Secretary of Interior and filed their reasons and brief in support thereof stating among other things that the Commissioner erred in holding that the Supreme [4] Court of the United States, in the case of Krushnic v. Wilbur, 280 U.S. 306, had held that the United States is concerned with the doing of assessment work on an oil shale placer claim validly existing on February 25, 1920, and that the Commissioner erred in failing to give the appellants a hearing as requested by them and a chance to prove the truth of the matters set out in the answer.

8. That on September 18, 1930, Joseph B. Umpleby, et al., by their attorneys, wrote the Secretary of the Interior as follows: "One of the questions involved in the contest is the right of the United States to contest for alleged default in assessment work. This same question has been raised in Denver Land Office contest No. 12264, United States v. Federal Shale Oil Company, involving Buck Canyon No. 1 oil shale placer. Since the Federal Shale Case is being very fully briefed and will probably

be argued orally, we suggest that the decision in the case of U. S. v. L. Z. Harrison, Joseph B. Umpleby, et al. be deferred until after the Federal Shale Case has been decided."

9. That on November 29, 1930, a written decision was rendered by Assistant Secretary, John H. Edwards, designated (A. 15072), L. Z. Harrison, Joseph B. Umpleby, et al. A copy of the decision is marked as Exhibit A-1 and is attached hereto, incorporated herein by reference and made a part hereof.

10. That in written decision (A. 15072) John H. Edwards, Assistant Secretary, stated: "An appeal to the Department was taken and following the same, the attorneys for the claimant [5] requested that decision herein be deferred to await decision in the case of the Federal Shale Oil Company, which was being very fully briefed and would probably be argued orally. Decision in the cited case was rendered November 11, 1930 (A-15048, 53 L. D. -), and the conclusions therein reached are applicable and govern herein. For the reasons stated in said decision of November 11, 1930, the decision appealed from is affirmed."

11. That on June 3, 1935, the Supreme Court of the United States in Ickes v. Virginia-Colorado Development Corp. (295 U.S. 639), held against the Department of Interior on their interpretation of Wilbur v. Krushnic (280 U.S. 306) and said: "So far as the government was concerned, failure to do assessment work for any years was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted.

12. That on June 24, 1935, a written decision, The Shale Oil Company, (55 I.D. 287) was rendered by Assistant Secretary Walters. A copy of the decision is marked as Exhibit A-2 and attached hereto, incorporated herein by reference, and made a part hereof.

13. That on page 290 of The Shale Oil Company Case, it is stated, "The Supreme Court, adverting to the fact that the validity of the locations there involved was not questioned, except as to failure to perform assessment

work, held that plaintiff (The Virginia-Colorado Development Corporation) lost no rights by failure to do the assessment work; that failure gave [6] the Government no right of forfeiture; that the plaintiff came directly within the exception contained in Section 37 of the Leasing Act saving existing valid claims 'thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws'; that the challenge to the valid existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings, and the decision set forth in the bill, went beyond the authority conferred by law."

"In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein in the instant case must be held as without authority of law and void. The above-mentioned decision of the Department in the Virginia-Colorado Development Corporation case and the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of Francis D. Weaver and Federal Oil Shale Company and other Departmental decisions in conflict with this decision are hereby overruled."

14. That by virtue of The Shale Oil Company decision, the Francis D. Weaver and Federal Oil Shale Company cases and other departmental decisions in conflict with The Shale Oil Company case, including (A. 15072) L. Z. Harrison, Joseph B. Umpleby, et al. were expressly overruled.

15. That on April 17, 1964, a written decision, Union Oil Company of California, et al. A-29560, was rendered by the Solicitor of the Department of Interior. A copy of the decision is marked as Exhibit A-3 and attached hereto, incorporated herein by reference, and made a part hereof.

[7] 16. That the Solicitor made a gross mistake of fact on Page Six (6) of the opinion (Exhibit A-3) when he found that Umpleby, et al. had not appealed the decision of the Land Commissioner to the Secretary, when in fact an appeal was made as shown in Exhibit A-1 attached to this complaint.

17. That the Solicitor was wrong as a matter of law when he concluded that the decision of The Shale Oil Company case overruling the Francis D. Weaver and Federal Oil Shale Company cases and other Departmental decisions in conflict with this decision was a legal void.

18. That the Solicitor was wrong as a matter of law when he concluded that the action taken by the Department of Interior that was declared beyond its authority in the Ickes v. Virginia-Colorado Development Corp. case, 295 U.S. 639, now acquires validity by the doctrine of finality of administrative action.

19. That the Solicitor was wrong as a matter of law on all other legal conclusions reached in his decision of April 17, 1964. (Exhibit A-3)

20. That the Solicitor was wrong as a matter of law in rejecting Patent Application (Colo. No. 030979).

21. That plaintiffs have exhausted all of their administrative remedies within the Department of Interior in respect of the matters set forth in this Complaint.

Second Claim for Relief

1. The allegations of Paragraphs One through Fifteen of the First Claim for Relief are incorporated herein by reference.

[8] 2. That after Wilbur v. Krushnic, supra, in 1930, and again after the 1935 decision in Ickes v. Virginia-Colorado Development Corp., supra, the defendant's predecessors in office decided that all prior decisions invalidating oil shale claims for failure to perform assessment work, including the decision by the Secretary in Contest No. 12029, were null and void and had no effect on such claims.

3. That during the period 1935 through 1962, the defendant, his predecessors in office and officials and employees of the Department of the Interior repeatedly and publicly affirmed that the decisions in the assessment work contest proceedings, including Contest No. 12029, were void and of no effect and did not operate to invalidate or otherwise adversely affect the interests of the plaintiffs, their predecessors in interest and others similarly situated.

4. That during the period 1935-1962, the defendant and his predecessors in office issued land patents covering at least 74,000 acres of oil shale claims which had been declared null and void in assessment work proceedings such as those here involved and which were in all respects of fact and law the same as the mining claims referred to in Paragraph No. 1 of the First Claim for Relief above, with full knowledge that such contest proceedings had resulted in decisions adverse to the claims. The Department's consistent practice of issuing patents for oil shale claims which had purportedly been invalidated by assessment work proceedings was widely known throughout the area in which the claims were located, and were known both to the plaintiffs and to their predecessors in interest.

[9] 5. That by reason of the facts set forth in Paragraphs 2, 3 and 4 above, the Department has duly adopted a rule of law, which cannot be retroactively altered, that the assessment work contest, including Contest No. 12029, had no effect on the validity of mining claims.

6. That from 1935 until 1962, the plaintiffs or their predecessors in interest both knew of and relied upon the consistent policy of the defendant and his predecessors in office of treating the decisions in the original and the renewed assessment work contests, including the decision in Contest No. 12029, as nullities with no force and effect. During that period the defendant and his predecessors, through their authorized subordinates, made repeated representations to the plaintiffs, their predecessors in interests, their representatives, advisers, and neighbors, that the assessment work contests had no effect on the validity of mining claims, and the plaintiffs have justifiably relied upon such representations in the expenditure of time and money in acquiring, improving, and perfecting their rights to the mining claims set out in Paragraph 1 of the First Claim for Relief above.

7. That the decision of the Solicitor of the Department of Interior, dated April 17, 1964, rejecting Patent Application (Colo. 030979) is arbitrary, capricious, and violates the Constitutional guaranties of the Fifth Amendment of the Constitution of the United States.

Third Claim for Relief

1. The allegations of Paragraphs One through Fifteen of the First Claim for Relief are incorporated herein by [10] reference and the allegations of Paragraphs Two through Six of the Second Claim for Relief are incorporated herein by reference.

2. That the granting of patents to other oil shale placer mining claims that were contested for the same reasons and had the same status as the claims in this action (Colo. 030979) and the rejection of these claims by the Solicitor of the Department of Interior in the decision of April 17, 1964, denied to the plaintiffs equal protection of the law; contrary to the Fifth Amendment of the Constitution of the United States.

Fourth Claim for Relief

1. That the allegations of Paragraphs One through Fifteen of the First Claim for Relief are incorporated herein by reference, and the allegations of Paragraphs Two through Six of the Second Claim for Relief are incorporated herein by reference.

2. That in 1952 the Bureau of Land Management, Region IV, of the Department of Interior recognized the validity of oil shale placer mining claims that had been contested for failure to do assessment work and proposed a program to accelerate processing of claims to patent.

3. That in 1954 the U. S. Department of the Interior, Bureau of Mines, met with the owners of unpatented oil shale placer mining claims and encouraged them to core drill their shale claims in order to supply the Bureau of Mines more core hole assay information.

[11] 4. That in 1957, the U. S. Department of Interior, Geological Survey, was contacted by the plaintiffs and advised that plaintiffs had valid oil shale placer claims and that core holes would be drilled by plaintiffs on the placer claims involved in this action, and the core hole assay information was supplied to the Department of the Interior.

5. That in 1959 Mineral Patent Application Colo. 030979 was made on the claims involved in this action.

6. That in 1959 the U. S. Department of the Interior, Geological Survey, was notified by plaintiffs that they had valid oil shale placer mining claims and protested the formation of a Federal Oil and Gas Unit embracing portions of their claims.

7. That in 1960 the Honorable Fred H. Seaton, Secretary of the Interior, was personally notified by plaintiffs as to the existence of the valid oil shale placer mining claims involved in this action.

8. That in 1960 the Department of Interior, Bureau of Mines, used the core hole assay information supplied to them by plaintiffs from the claims involved in this action in a published U. S. Bureau of Mines, Report of Investigations, 5614.

9. That the first time that plaintiffs were notified of the Department of Interior's new policy was on February 16, 1962, when the Manager of the Colorado Land Office of the Bureau of Land Management rejected plaintiffs' application for patent (Colo. No. 030979).

10. That the decision of the Solicitor of the Department of Interior, dated April 17, 1964, rejecting Patent [12] Application (Colo. 030979) destroys a vested property right in a possessory mining claim and violates the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

Fifth Claim for Relief

1. That the allegations of Paragraphs One through Fifteen of the First Claim for Relief are incorporated herein by reference; the allegations of Paragraphs Two through Six of the Second Claim for relief are incorporated herein by reference and the allegations of Paragraphs Two through Nine of the Fourth Claim for Relief are incorporated herein by reference.

2. That because of the allegations set forth hereinabove, the Solicitor of the Department of Interior in his decision dated April 17, 1964, rejecting Patent Application Colo. No. 030979, made a mistake of law resulting in constructive fraud.

3. That plaintiffs have exhausted all of their administrative remedies with the Department of Interior in respect to the matters set forth in this Complaint.

Wherefore, plaintiffs pray that the Court adjudge, decree and declare:

(a) That the decision of the Solicitor of the Department of the Interior dated April 17, 1964, rejecting Patent Application Colorado No. 030979 is null and void.

(b) That the defendant take such action as is [13] necessary to issue patents to the plaintiffs to the Elizabeths Nos. 1, 2, 4 to 12 oil shale placer mining claims and the Carbon Nos. 1 through 5 oil shale placer mining claims.

(c) For such other, different and further relief as may to the Court seem just and proper.

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Denver 15, Colorado

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Address of Plaintiffs:
7675 W. 14th Avenue
Denver 15, Colorado

Filed July 13, 1964

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* * * *

[23]

EXHIBIT A-3

United States Department of the Interior Office of the Solicitor Washington 25, D.C. Apr 17 1964 In reply refer to:

A-29560 Union Oil Company of California, et al.

BLM 07667, et al. Mineral patent applications rejected Affirmed in part; held in abeyance in part, pending further findings of fact.

Appeal From Land Office Decisions

The Union Oil Company of California and others[1] have each appealed to the Director of the Bureau of Land Management from decisions of the Manager of the Colorado Land Office issued on February 16 and 23, 1962. These decisions rejected mineral patent applications for oil shale placer mining claims on lands in Garfield and Rio Blanco counties, Colorado. The Secretary assumed supervisory jurisdiction because of the importance of the issues involved and assigned the case to the Solicitor for final decision.[2] Since the facts out of which these appeals arise are identical or similar and, since all of the claims involve identical issues and common questions of law, the appeals will be considered together.

[24] The Manager rejected each of the patent applications under consideration on the ground that appellant's mining claims had been declared null and void in adverse proceedings brought by the Government between 1930 and 1933 on the charge of failure to perform annual assessment work. In 1935, in a case not involved in this appeal, the Supreme Court held that failure to perform annual assessment work was not a ground for cancellation of oil shale placer claims by the Government. Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639 (1935). The basis of the Manager's decisions in the

[1] The appeal numbers, the names of the appellants, the serial numbers of their patent applications, and the dates of the decisions appealed from are set forth in appendix A.

[2] Memorandum of the Secretary, May 8, 1962.

present cases was not that the original cancellations were correct as a matter of law at the time they were made, but rather, that "under . . . principles of finality of administrative action, estoppel by adjudication, and res judicata . . .", they cannot now be challenged.

As a preliminary matter, the appellants have joined in a motion to vacate the Colorado Land Office Manager's decisions or, in the alternative, to remand these cases for full hearing, after notice, of matters of fact and law relied upon by the Manager in rendering his decisions. The motion is based on assertions which, for the most part, raise the same issues involved in the appeal. The issues raised in the motion will, therefore, be disposed of in this opinion together with the issues raised by the appellants on the appeal.

The decisions of the Land Office Manager are first attacked on the ground that the Department was required by law and regulation to provide a hearing on the questions of fact and law decided by the Manager. It is further asserted that the Manager exceeded his authority [25] in that the decisions rendered by him were tantamount to an adjudication of the validity of the appellant's mining claims, no hearing having been held. This, appellants contend, operates to deprive them of due process of law.

The assertion is then made that the cancellations upon which the Manager based his decisions were of no effect since the Department never obtained personal jurisdiction over the contestees in the original proceedings and, in fact, never actually canceled some of the claims upon which the present appellants base their applications.

Assuming, arguendo, that the Land Office Manager had the authority to decide these cases without providing a de novo hearing in each case, the appellants assert that the principles upon which the Manager based his decision are not controlling here. They contend that, so long as he retains jurisdiction over the lands in question, the Secretary may, in the exercise of his supervisory authority, vacate any decision subsequently found to be in error even though the time within which an appeal could be prosecuted has expired. This, the appellants contend, is what occurred when the Secretary decided The Shale

Oil Company, 55 I.D. 287 (1935), which "overruled" prior Departmental decisions canceling oil shale placer claims for failure to perform annual assessment work.

Next, the appellants contend that the doctrine of res judicata is not applicable to administrative decisions. [26] The appellants further assert that the principles of finality of administrative action, estoppel by adjudication and res judicata are inapplicable in the present case since the Supreme Court, in Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639 (1935), held that the cancellation of a mining claim upon the ground of failure to perform annual assessment work was beyond the jurisdiction and power conferred by law upon the Secretary and that such cancellation is now subject to collateral attack.

Finally, the appellants contend that since Ickes v. Virginia-Colorado Development Corporation, suprs, and The Shale Oil Company, supra, the Department has consistently treated the early decisions of the Land Commissioner as being void and of no legal effect and has at all times prior to Febuary, 1962, recognized the validity of the appellants' claims.

Early Departmental Decisions and Policy

Before considering the appellants' contentions, the early decisions and departmental policy regarding oil shale placer claims will be examined briefly.

Prior to 1920, the Department of the Interior held that failure to perform annual assessment work on mining claims [3] rendered the [27] land subject to relocation by others but did not constitute grounds for the Government to cancel such claims. P. Wolenberg, 29 L. D. 302 (1899). Thereafter, all oil shale lands were withdrawn from location by the Mineral Leasing Act of February 25, 1920 (41 Stat. 451, 30 U.S.C., sec. 193), subject to the rights of owners of valid mining claims "thereafter maintained in compliance with the laws under which initiated."

In Emil Krushnic, 52 I.D. 282 (1927), the Department held that failure to perform annual assessment

[3] As required by the Mining Law of May 10, 1872 (Rev. Stat., secs. 2324, 2325, 30 U.S.C., secs. 28, 29).

work was a failure to maintain a claim under the law and automatically subjected the claim to cancellation by the Government. The Supreme Court rejected this theory in Wilbur v. Krushnic, 280 U.S. 306 (1930), and held that a failure to do assessment work could not be challenged by the Government following the resumption of work on the claim.

Following Wilbur v. Krushnic, supra, the Department took the position that the United States could make a lawful challenge to the validity of an oil shale claim for failure to perform annual assessment labor if such challenge was made before assessment work was resumed on the claim.[4] Accordingly, the Land Commissioner ordered that new [28] adverse proceedings be commenced on each claim on which there was an actual default and no resumption of the annual labor required by the statute.

However, in Ickes v. Virginia-Colorado Development Corporation, 295 U. S. 639 (1935), the Supreme Court declined to accept the Department's theory that oil shale claims could be canceled where assessment work was delinquent and had not been resumed. The Court said that the decision of the Department in canceling these claims "... went beyond the authority conferred by law." 295 U. S. at 647.

Shortly thereafter, the Department issued its decision in The Shale Oil Company, 55 I. D. 287 (1935), which recalled and vacated the departmental decision in Virginia-Colorado Development Corporation, 53 I. D. 666 (1932), and held that all other departmental decisions and instructions which were inconsistent with the decision of the Supreme Court were "overruled". The early decisions canceling the claims now being considered were never reopened, recalled or vacated in proceedings following The Shale Oil Company, supra.[5]

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[4] Instructions, 53 I.D. 131 (1930).

[5] With one exception, no appeals were taken from the decisions of the Land Commissioner which canceled the claims in issue here. In one case, the cancellation of the Oyler Nos. 1-4 oil shale placer claims was appealed to the Secretary of the Interior. The cancellation was upheld by the Secretary (The Index Shale Oil Company, A-16465 (March 10, 1932)), and the final Departmental decision

[29] Procedural Requirements of Departmental Regulations, the Administrative Procedure Act, and the Fifth Amendment

As stated above, the appellants have joined in a motion to vacate the Land Manager's decisions and/or to remand the case for full hearing on issues of fact and law. The motion is based, in part, on the assertion that the Manager was required to refer the matter to a hearing examiner for a full hearing and that his failure to do so is tantamount to an attempt to invalidate the claims without a hearing of any kind. However, hearings were in fact held in the contest proceedings involving many of the claims included in this appeal[6] [30] and the then-owners of those claims participated in the hearings and preserved their right of appeal.[7] The reapplication for a patent by a claimant after his claim has been contested successfully or after his patent application has been denied does not require the Department to grant a new hearing. (Gabbs Exploration Co., 67 I.D. 160 (1960). The assertion that a de novo hearing is

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was not challenged by subsequent court action. The Oyler Nos. 1-4 claims form the basis for an application filed by Pacific Oil Company which was rejected by the Manager in February, 1962, and which is included among the rejections on appeal herein.

[6] The following claims were canceled in contest proceedings in which the owners of the claims participated:

Carbon Nos. 1-4 (Colo. No. 030979), canceled in Contest No. 12029
Elizabeth Nos. 1,2 and 4-12 (Colo. No. 030979), canceled in Contest No. 12029
Southeast (Colo. No. 028751), canceled in Contest No. 12972
Northeast " " " " " " " "
Northwest " " " " " " " "
Oyler 1-4 (Colo. No. 12327), canceled in Contest No. 12039
Jack Pot Nos. 4-11 (Colo. No. 045092), canceled in Contest No. 13038

[7] The applicable Rules of Practice provided as follows: No person who has failed to answer the contest affidavit, or having answered, has failed to appeal at the hearing, shall be allowed to appeal from the final action or decision of the Manager . . . 43 C.F.R., sec. 221. 49,. 19 F.R. 9056 (1954).

now required is without merit where such cancellations were made in default proceedings in the manner prescribed by applicable departmental regulations,[8] the owners having been properly served with notice of contest and provided an opportunity to challenge the cancellation of the claim. This same contention was raised and rejected by the Department in Gabbs Exploration Co., supra. The latter case was upheld on review by the United States District Court for the District of Columbia and affirmed on appeal to the United States Court of Appeals for the District of Columbia Circuit.[9] The opinion [31] by the court contains the following pertinent discussion concerning the adequacy of notice:

> The owners of the . . . claims were not denied due process in the original contests, for it is clear that they had adequate notice of the contest against them, they were offered a hearing, and they were informed of the cancellation of their claims. In view of what we have previously stated, there was no jurisdictional defect in the 1929 contests. . . . . 315 F. 2d at 39-40.

As recognized in the Gabbs Exploration Co. decision, supra, the essential elements of due process are notice and an opportunity to defend against the charges asserted. (Simon v. Craft, 182 U.S. 427 (1901), Cameron v. United States, 252 U.S. 450 (1920)). The failure of the owners of these claims to participate in the contest proceedings of which they had adequate notice and in which they had an opportunity to defend the validity of the claims at a hearing does not entitle such owners or their successors in interest to another opportunity for a hearing on the same question. The fact that an opportunity for a hearing was forfeited by the default of the owners of these claims does not furnish the basis for a claim that due process of law has been denied. (See

[8] Circular No. 460, entitled "Manner of Proceeding in Contests Initiated Upon a Report by a Representative of the General Land Office," is reproduced in full and attached hereto as Appendix B. Sections 4, 5 and 6 thereof set forth the form and manner of issuing the notice of contest to the claimant in this class of cases. This Circular was effective at all times relevant here.

[9] Gabbs Exploration Co. v. Udall, 315 F. 2d 37 (1963).

American Surety Co. v. Baldwin, 287 U.S. 156, 169 (1932); Opp Cotton Mills Inc. v. Administrator of the Wage and Hour Division of the Department of Labor, 312 U.S. 126, 152 (1941)).

Appellants' assertion that failure to order a new hearing deprived them of due process is, therefore, rejected insofar as notice of contest is found to have been adequate in the original contest proceedings.

[32] In those cases in which the requirements of notice were definitely met prior to the cancellation of the claim, the then owners of the claim having participated in the contest proceedings, the order affirming the decision of the Land Manager will, for reasons set out herein, become effective immediately.

In the remaining cases, the appellants will be granted 60 days within which to submit materials relating solely to their contention that their claims were canceled without compliance with the requirements of notice. Thereupon, a determination regarding the sufficiency of notice will be made. If necessary, hearings will be ordered to resolve any factual questions which remain unresolved on the record. If no such materials are received from these appellants within the 60 day period, they will be considered to have conceded that the Departmental records accurately reflect the facts regarding the issuance of notice in the early contest proceedings and the determination will be made on the basis of the present record.

[33] Effect of the Shale Oil Company Case

Upon the authority of the decision of the Supreme Court in Ickes v. Virginia-Colorado Development Corporation, supra, the decision of the Commissioner declaring oil shale placer claims forfeited in The Shale Oil Company, supra, was reversed by the Department.[10] It was stated in the Department's decision that:

The above-mentioned decision of the Department in the Virginia-Colorado Development Corporation case and the

[10] The Shale Oil Company, 55 I.D. 287 (1935). The Shale Oil Company decision had been held up to await the Ickes v. Virginia-Colorado Development Corporation decision then pending in the Supreme Court.

instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of Francis D. Weaver and Federal Oil Shale Company and other Departmental decisions in conflict with this decision are hereby overruled. The Commissioner's decision is *reversed*, and the record in the case *remanded* with instructions to reinstate the application and entry *in toto* and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clear list the application for patent. (Emphasis supplied.) 55 I.D. at 290.

The appellants contend that, by overruling all Departmental decisions in conflict with The Shale Oil Company, the Secretary exercised his supervisory authority to nullify [34] all conflicting decisions of the Land Commissioner including those involved in the present appeal. In other words, it is argued that while the earlier decisions purported to cancel appellants' claims, The Shale Oil Company, supra, reinstated or corrected them in accordance with the decision of the Supreme Court in Ickes v. Virginia-Colorado Development Corporation. We do not agree. This is not what the decision either said or accomplished.

The language in The Shale Oil Company case distinguishes those cases actually before the Secretary from those which were not. As to the former, the Commissioner's decisions canceling the claims were expressly recalled and vacated. The latter were merely "overruled." [11]

The Department of the Interior has often "overruled" former holdings without in any way nullifying the action taken thereunder.[12] [35] To nullify action previously

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[11] See e.g., Francis D. Weaver, 53 I.D. 175 (1930), and The Federal Shale Oil Company, 53 I.D. 213 (1930), both of which were cited in The Shale Oil Compnay and merely "overruled." They have been treated as simply "overruled" ever since. See the cumulative Table of Modified and Overruled Cases in the frontispiece of Interior Department Decisions.

[12] See Instructions, 35 L.D. 549 (1907). And see Franco Western Oil Company, 65 I.D. 427 (1958); Anna R. Paul, A-24350 (1947) (upheld by the District Court for the District of Columbia in Anna R. Paul v. Marion Clauson, Civil No. 3309-48 (unreported)); Solici-

taken by giving retroactive effect to a change in administrative practice or legal ruling does violence to the settled principle of finality of administrative action. In this regard, the following statement set forth in Franco Western Oil Company, 65 I.D. 427 (1958), adequately summarizes the Department's long-standing practice:

> . . . the rule applied by the Department on those occasions when it has specifically considered the question as to whether, because of a change in the interpretation of a statute, its holding should have retroactive effect, has been to deny such effect to its decisions. 65 I.D. at 429.

In Safarik v. Udall, 304 F. 2d 944 (D. C. Cir. 1962), the Court of Appeals for the District of Columbia Circuit upheld the long-standing practice of the Department of the Interior to give prospective application to its decisions. The Court therein stated:

> . . . the Secretary of the Interior . . . should have and does have authority, when he promulgates an interpretive regulation, *or hands down a decision placing a different construction on a statute or regulation, from that laid down in an earlier decision or regulation, to give prospective operation only to the later regulation or decision.* (Emphasis supplied.) 304 F. 2d at 950.

It is therefore concluded that the Departmental decision in The Shale Oil Company, supra, merely recalled and vacated the earlier decision in that particular case ". . . thereby depriving the earlier opinion of all authority as a precedent." [13] It is further concluded [36] that the decision in The Shale Oil Company, supra, had no effect on the cases presently before us in this appeal.

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tor's Op., 58 I.D. 319 (1943); Timothy Sullivan, Guardian of Juanita Elsenpeter, 46 L.D. 110 (1917), overruling Heirs of Susan A. Davis, 40 L.D. 573 (1912); Bertha M. Birkland, 45 L.D. 104 (1916); Lillie E. Sterling, 39 L.D. 346 (1910). The rule of prospective operation of administrative rulings has been followed by other Governmental agencies. See generally, Davis, Administrative Law Treatise, secs. 5.09 and 17.07.

[13] Black, Law Dictionary (4th ed. 1951).

Application of the Doctrine of Finality of Administrative Action

The contention made by appellants that the doctrine of res judicata has no application to decisions of administrative agencies is erroneous.[14] The contention that the doctrine of res judicata (or its administrative-law counterpart—the doctrine of finality of administrative action) has not been recognized and applied before the Department of the Interior is *similarly* unsupportable. Since 1883[15] the Department has consistently held that the doctrine of res judicata is applicable to departmental decisions.[16] In 1886, Secretary Lamar stated, in Rancho San Rafael De La Zanja, 4 L.D. 482, that:

[37] Unless the principle of res judicata is recognized administrative action may become involved in chaos; the labors of the Department would become too cumbrous to admit of their intelligent discharge; uncertainty would cloud every inchoate title and, in many instances, vested rights would be endangered. 4 L.D. at 482.

In addition to the numerous departmental decisions recognizing the doctrine of administrative action, it has been implemented in the rules of practice before the Department.[17]

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[14] See generally, 50 C.J.S., Judgments-Public Officers and Boards, sec. 606; 2 Davis, Administrative Law Treatise, sec. 18.10 and authority cited therein.

[15] See Meredith v. The Atlantic and Pacific Railroad Company, 2 L.D. 499 (1883).

[16] See, e.g., Edward Christman, 62 I.D. 127 (1955); H. W. Rowley, 58 I.D. 550 (1943); Henshaw v. Ellmaker, 56 I.D. 241 (1937); Charles Perkins, 50 L.D. 172 (1923); Lillie M. Kelly 49 L.D. 659 (1923); Fosdick v. Shackleford, 47 L.D. 558 (1920); Lacey v. Grondorf, 38 L.D. 553 (1910), Gammon v. Weaver, 26 L.D. 383 (1898); Mee v. Hughart, 23 L.D. 455 (1896); Mary C. Stephenson, 11 L.D. 232 (1890); A. T. Lamphere, 8 L.D. 134 (1889); Higgins v. Wells, 3 L.D. 21 (1884).

[17] Prior to revision in 1956, 43 C.F.R. sec. 221, provided as follows: No appeal shall be had from action of Director affirming the decision of the manager in any case where the party adversely

The doctrine of res judicata, as applied in administrative decisions by this Department, is designed to achieve orderliness in the administration of the public lands as well as finality of decisions which have been closed finally and have not been appealed or otherwise attacked. Every reason of policy which supports the doctrine in the courts is applicable here. There must be an end to administrative litigation also. Public rights as well as private cannot be indefinitely suspended because further litigation may someday be initiated.

In applying the doctrine here, we are aware of the principle, [38] urged so strongly by the appellants, that since the Secretary has a continuing jurisdiction with respect to public lands until a patent issues, he is not estopped by the principles of res judicata and finality of administrative action, from correcting or reversing an erroneous decision by his subordinates or his predecessor in office. However, where, as here, the claim has been declared null and void in regular proceedings and the mining claimant acquiesces in such decision for many years, the decision nullifying the claim will be treated as conclusive and will not be reopened in the absence of a legal or equitable basis warranting reconsideration. (Gabbs Exploration Co., 67 I.D. 160 (1960); Gabbs Exploration Co., A-28213 (May 24, 1960) and A-28213 (Supp.) (July 11, 1960); Garfield County Exploration Co., A-28351 (August 30, 1960); Langdon H. Larwill, A-28697 (May 16, 1963). Nor does the fact that the legal basis for the decision has later been held by the court of appeals or the Supreme Court to be erroneous require a reconsideration and reversal of cases finally decided before the change in the interpretation or application of the law. (See e.g., Edward Christman, 62 I.D. 127 (1955); Lillie M. Kelly, 49 L.D. 659 (1923); and Mee v. Hughart, 23 L.D. 455 (1896)).

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affected shall have failed to appeal from the decision of said manager. 43 C.F.R. sec. 221.74.

The pertinent portion of the revised regulations provides: Effect of Failure to Appeal. When any party fails to appeal from an adverse decision of the Directors that decision shall as to such party be final and will not be disturbed except for fraud or for gross irregularity. 43 C.F.R. sec. 221.10, as revised in Circular 1950, 21 F.R. 1860, March 27, 1956.

In Lillie M. Kelly, supra, the Department of the Interior had canceled homestead entries after the issuance of the receiver's receipt. Kelly did not appeal from the decision and acquiesced therein for five years or more. In similar proceedings in another case (Thomas J. [39] Stockley, 44 L.D. 178 (1915)), the decision of the Secretary was challenged in a suit in equity and appealed eventually to the Supreme Court. The Court, in Stockley v. United States, 260 U.S. 532 (1923), held that:

The action of the Commissioner of the General Land Office, therefore, in directing a contest against Stockley's entry three years after the issuance to him of the receiver's receipt, *was unauthorized and void.* (Emphasis supplied.) 260 U.S. at 544.

Following the Supreme Court's decision in the Stockley case, Mrs. Kelly applied for an unrestricted patent claiming the earlier contest against her entry was "unauthorized and void." The Department's decision contains the following pertinent statement:

The Department has held that a decision made in accordance with the practice prevailing at the time it was rendered, if accepted by the parties affected as final, will not be re-opened for the reason that the practice then prevailing *has subsequently been held erroneous by the Supreme Court.* (Emphasis supplied.) 49 L.D. at 662.

The principle upon which the Department relied in canceling numerous oil shale placer claims was declared by the Supreme Court to be erroneous and beyond the authority conferred by applicable statutes. Ickes v. Virginia-Colorado Development Corporation, supra. The early decisions in the cases presently before the Secretary were not appealed and the Department has not vacated them. They were acquiesced [40] in by those adversely affected for over 25 years. "The fact that . . ." the principle on which these earlier decisions are based is ". . . now held by the Supreme Court to be erroneous is not deemed a sufficient reason for reversing and annulling decisions which have become final." Mee v. Hughart, supra.

Jurisdiction of the Land Commissioner and Effect of Ickes v. Virginia-Colorado Development Corporation

The appellants contend that the Supreme Court, in Ickes v. Virginia-Colorado Development Corporation, supra, held that the Department of the Interior was without jurisdiction to cancel claims for failure to do assessment work. Of course, no adjudication can be said to be res judicata if it was rendered by a tribunal not having jurisdiction.[18] But the Court did not hold that the Department lacked jurisdiction. To the contrary, it was held that:

There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment.[19] 295 U.S. at 645 [41] And on the question of the Secretary's authority to cancel for failure to perform assessment work, the Court stated:

We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. 295 U.S. at 643.

It is on the basis of this language that appellants contend that the Secretary was without jurisdiction to challenge these claims. A close examination of that language, the history of the litigation and related decisions requires the rejection of appellants' contention.

Earlier, in Wilbur v. Krushnic, 280 U.S. 306 (1930), the Court had concluded that the Department could not cancel claims upon the ground of failure to do assessment work following the resumption of work. The Court did not deny the Secretary's jurisdiction. In fact, it af-

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[18] Compare, Best v. Polk, 85 U.S. (18 Wall.) 112 (1873), with, Minter v. Cromelin, 59 U.S. (18 How.) 89 (1856). And compare, Doolan v. Carr, 125 U.S. 618 (1887), with, Quinby v. Conlan, 104 U.S. 420 (1882). And see, American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

[19] Citing Cameron v. United States, 252 U.S. 450, 460 (1920); Cole v. Ralph 252 U.S. 286 (1920); Black v. Elkhorn Mining Co., 163 U.S. 445, 450 (1896); Brown v. Gurney, 201 U.S. 184, 192, 193 (1906); Farrell v. Lockhart, 210 U.S. 142, 147 (1908).

firmed his full authority to consider the case but found that he had ". . . interpreted and applied a statute in a way contrary to its explicit terms . . .".[20] In explaining the effect of the Secretary's error in contruing the statute,[21] Roberts v. United States, 176 U.S. 221 (1900), was quoted as follows:

[42] Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. . . . 176 U.S. at 231.[22]

A clear analogy *exist* in the principles applicable to the public lands. Cameron v. United States, 252 U.S. 450 (1920). In the Cameron case the Court stated:

By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. 252 U.S. at 459-60.[23]

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[20] 280 U.S. at 319.

[21] The Mineral Leasing Act of 1920, 41 Stat. 451, 30 U.S.C., sec. 193.

[22] See also, United States ex rel. Ness v. Fisher, 223 U.S. 683 (1921); and Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840).

[23] Citing Rev. Stat., secs. 441, 453, 2476; United States v. Shurz, 102 U.S. 378, 395 (1880); Lee v. Johnson, 116 U.S. 48, 52 (1885); Knight v. United States Land Ass'n. 142 U.S. 161, 177, 181 (1891), Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903). The nature and extent of the Department's jurisdiction over the disposition of public lands, and particularly under the mining laws, was more recently discussed in Duguid v. Best, 291 F. 2d 235 (9th Cir. 1961), in the following terms:

It is undisputed that the Congress has granted to the Secretary of the Interior general supervisory authority over public business relating to public lands, including mines.

. . . there can be no question as to the power and authority of the Secretary of the Interior, under the grant of authority to super-

[43] And further:

True, the Mineral Land Law does not itself confer such authority on the Land Department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the Land Department. 252 U.S. at 461.[24]

These principles were most recently reiterated by the Supreme Court in Best v. Humboldt Mining Co., 371 U. S. 334, 337 (1963).

In United States v. Winona & St. P. R. Co., 67 Fed. 848 (8th Cir. 1895), aff'd., 165 U. S. 463 (1897), the Court of Appeals set forth the following test for determining whether the Land Department had jurisdiction over the subject matter with which it purports to deal:

Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. *The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong.*[25] (Emphasis supplied.) 67 Fed. 959-60.

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vise public business on public lands, including mines, to initiate through the subordinate Bureau of Land Management a contest in order to see "that valid claims on public land may be recognized, invalid ones eliminated, and the rights of the public preserved." 291 F. 2d at 241.

[24] See also Cole v. Ralph, 252 U.S. 286 (1920), Farrell v. Lockhart, 210 U.S. 142 (1908), Brown V. Gurney, 201 U.S. 184 (1906); and Black v. Elkhorn Mining Co., 163 U.S. 455 (1896). And see generally, Standard Oil Co. of California v. United States, 107 F. 2d 402 (9th Cir. 1940).

[25] See also, United States v. Northern Pac. R. Co., 95 Fed. 864 (8th Cir. 1899), aff'd., 177 U.S. 435 (1900) and Foltz v. St. Louis & S.R.Ry. Co., 60 Fed. 316 (8th Cir. 1894). And see King v. McAndrews, 111 Fed. 860 (8th Cir. 1901), wherein the court stated the principle as follows:

The test of jurisdiction is not right decision, but the right to enter upon inquiry and to make some decision. [Citations] Hence

[44] Having concluded that the Secretary or the Land Commissioner had jurisdiction over the subject matter of the claims presently in dispute, and that they had the necessary authority to enter upon the inquiry as to the validity of the claim, we have only to determine the ultimate effect of an error of law committed by these officials in the exercise of this authority. In this regard, we do not question that the appellants or their predecessors in interest could have invoked judicial review of the Department's decisions under applicable precedent,[26] even though the time within which the claimants could have appealed to the Secretary had expired. The claimants, following the decision in Ickes v. Virginia-Colorado Development Corporation, supra, had at least two alternatives open to them to protect their claims. They could have petitioned the Secretary to exercise his supervisory authority to recall and vacate the Land Commissioner's cancellation of the claim as he had done in The Shale Oil Company, supra, [45] or they could have sought relief in the courts in proper proceedings instituted for that purpose.[27] The Claimants did neither.

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a patent evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with the power, and charged with the duty, to decide, is as impervious to collateral attack as one which is the result of correct conclusions. 111 Fed. at 864.

[26] See e.g., El Paso Brick Co. v. McKnight, 233 U.S. 250 (1914), wherein the Court held that an order erroneously issued by the Department refusing a patent for a mining claim could not deprive the claimant of vested rights" . . . [f]or while the General Land Office had power of supervision over the acts of the local officers, and could annul entries obtained by fraud or made without authority of law, yet, *if the Department's cancellation was based upon a mistake of law, its ruling was subject to judicial review when properly drawn in question in judicial proceedings*, inasmuch as the power of the land office is not unlimited, nor can it be arbitrarily exercised so as to deprive any person of land lawfully entered and paid for." 233 U.S. at 257-58. (Emphasis supplied.)

[27] See e.g., Sanford v. Sanford, 139 U.S. 642 (1891); Shepley v. Cowan, 91 U.S. 330 (1876); Silver v. Ladd, 74 U.S. (7 Wall.) 219 (1869). In Sanford v. Sanford, supra, the court said:

. . . where the matters determined are not properly before the Department, or its conclusions have been reached from a miscon-

Since the judicial relief which was available to the claimants was equitable in nature, it was incumbent upon them to seek judicial relief within a reasonable time after the Supreme Court, in the Virginia-Colorado Development Corporation case, had determined that the concellations by the Department were erroneous. Otherwise, the claimants' judicial remedy would be subject to the equitable defenses of estoppel and laches unless it were clearly shown that the decision of the Department was void ab initio.

[46] When, as here, the administrative officer has acted within his jurisdiction and a judicial review of such action has not been sought on a timely basis, the principles of estoppel, laches and res judicata are merged in the doctrine of finality of administrative action and are operative to bar appellants' claim for relief. This conclusion is in accord with the principles set forth in the several recent cases discussed above, all of which involved oil shale placer claims.[28] The following language, used by the court in Gabbs Exploration Co. v. Udall, supra, in rejecting similar claims, is particularly pertinent here:

Here neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plain-

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struction by its officers, of the law applicable to the cases before it, and it had thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, *then the courts can in a proper proceeding*, interfere and control its determination so as to secure the just rights of parties injuriously affected. 139 U.S. at 647. (Emphasis supplied.)

See also, Moffat v. United States, 112 U.S. 24 (1884); Bernier v. Bernier, 147 U.S. 242 (1893); Moore v. Robbins, 96 U.S. 538 (1878); Johnson v. Towsley, 80 U.S. (13 Wall.) 72 (1871); Lindsey v. Hawes, 67 U.S. (2 Black) 554 (1963); Lytle v. Arkansas, 63 U.S. (22 How.) 193 (1860); Garland v. Wynn, 61 U.S. (20 How.) 6 (1857); Barnard's Heirs v. Ashley's Heirs, 59 U.S. (18 How.) 43 (1856); Cunningham v. Ashley, 55 U.S. (14 How.) 377 (1852).

[28] See Langdon H. Larwill, A-28697 (May 16, 1963); Gabbs Exploration Co., 67 I.D. 160 (1960); aff'd Gabbs Exploration Co. v. Udall, 315 F. 2d 37 (D.C. Cir. 1960); Garfield County Exploration Co., A-28351 (August 30, 1960) J. C. Nelson, 64 I.D. 103 (1957). See also, Charles D. Edmonson, 61 I.D. 355 (1954, and cases cited therein.

tiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years. Here twenty-seven years have elapsed between the alleged wrong (1929) and plaintiffs attempt to have it corrected (1956).

[47] There might be some reason to impel the Secretary to reopen a prior decision in order to purge an incorrect determination, but the passage of time might prevent or greatly hinder a proper determination of the initial question, in which case it would be inappropriate for him to reopen the case even though he retains jurisdiction over the land in dispute . . . 315 F. 2d at 41.[29]

It is evident that the Secretary or the Land Commissioner, in the Krushnic case, in the Virginia-Colorado Development Corporation case, [48] and in the cases before us in this appeal, had the duty, the responsibility and, necessarily then, the jurisdiction to construe the statute. The construction placed upon the statute was appealed in Krushnic and in Virginia-Colorado Development Corporation, and the contention of the appellant that the Secretary erred was upheld. However, in the cases before us, appellants cannot complain after nearly 30 years of silence, inaction, and acquiescence. Neither they nor their ". . . predecessors in interest took timely action to have the wrong righted. . . ." Gabbs Exploration Co. v. Udall, 315 F. 2d at 41.

Past Administrative Practice

Finally, the appellants contend that, following the decision in Ickes v. Virginia Colorado Development Cor-

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[29] The court also observed that:

The Department of the Interior, which has recognized the right of the Secretary to reconsider certain prior decisions, has also recognized that there must be some time limit on such reconsideration. As Assistant Attorney General Van Devanter said in Aspen Consolidated Mining Co. v. Williams, 27 L.D. 1, at 11:

"The parties remain the same and the one complaining of the former decisions has taken timely and decisive action to have the alleged wrong corrected." 315 F. 2d at 40-41.

poration, supra, and until the Manager's decision in February, 1962, rejecting their applications, the United States has consistently recognized the validity of the subject mining claims. They contend that there has been a long-standing, continuous and consistent administrative interpretation and application of the Virginia-Colorado Development case beginning with the Department's decision in The Shale Oil Company, supra. In this regard, the appellants rely upon certain letters written by officers of the Land Department which expressed the view [49] that the previous decisions of the Land Commissioner canceling oil shale placer claims were void and had no effect on the claim.[30]

The argument advanced by the appellants is not based on the facts. While some officials of the Department may have expressed the view that the original cancellations were void and of no effect, at the same time, action was taken with respect to the subject land which was entirely inconsistent with the recognition of valid and subsisting claims.

On April 15, 1930, pursuant to Executive Order No. 5327, all oil shale deposits owned by the United States were withdrawn, subject to valid existing rights, from lease or other disposal, except [50] for application for patent under the mining laws for metalliferous mining

[30] The following documents were submitted by the appellants as evidence of the Department's position:

1. Letter of July 29, 1935, from the Commissioner of the General Land Office to the Register, Denver, Colorado (attached as Appendix C-1).

2. Letter of April 22, 1963, from Ida Dere, Grand Valley, Colorado, (then owner of the Lucy Agnes Nos. 1-2 oil shale placer claims), to the Commissioner, General Land Office (attached as Appendix C-2).

3. Letter of May 4, 1936, from the Commissioner, General Land Office, to Ida Dere, Grand Valley Colorado (attached as Appendix C-3).

4. Letter of July 4, 1944, from the Commissioner, General Land Office, to Mr. W. Porter Nelson, Denver, Colorado. (attached as Appendix C-4).

5. Letter from the Commissioner, General Land Office, to Mr. Edward Altenbern, DeBeque, Colorado. (attached as Appendix C-5).

6. Letter of October 31, 1935, from the Acting Secretary of the Interior to the Secretary of the Navy. (attached as Appendix C-6).

claims or application based on claims initiated prior to the date of the withdrawal. The withdrawal lands were reserved for purposes of investigation, examination and classification. See Instructions, Circular No. 1220, 53 I.D. 127 (1930). Among the lands included in the withdrawal are those here under consideration as indicated in the instructions dated April 22, 1931, from the Commissioner of the General Land Office to the Register, Denver, Colorado, which listed among the subdivisions in Colorado covered by Executive Order No. 5327 all of secs. 7 to 36, T. 4S., R. 99 W., 6th P.M.

Executive Order No. 5327 above-mentioned, attached to the lands here under consideration as a secondary claim and operated to withdraw them from the public domain when the determination that the mining claims were null and void for failure to do assessment work became final, since, on the termination of the mining locations, possessory title to the lands reverted to the United States. See Cameron v. United States, 252 U.S. 450 (1920), Gabbs Exploration Company, 67 I.D. 160, 169 (1960); Solicitor's Opinion, 55 I.D. 205, 208 (1935). And see, Vanadium Corporation of America, et al., A-26914 (September 8, 1954). As a result of the decisions of the Land Commissioner in 1930 and 1931 declaring these claims null [51] and void for failure to do assessment work, Executive Order No. 5327 was operative to exclude all subsequent entries thereon, except as permitted by the order.

On February 6, 1933, Executive Order No. 6016 authorized the issuance of oil and gas leases under the Mineral Leasing Act on lands withdrawn by Executive Order No. 5327.

Pursuant to the later Executive Order, the Department has issued numerous oil and gas leases and the rights of the third party lessees have intervened. Some of the oil and gas leases are still outstanding and proceedings have been instituted under the Multiple Mineral Development Act (Act of August 13, 1954, as amended (30 U.S.C., sec. 527)), to determine the rights as between oil shale placer claimants and lessees under oil and gas leases issued by the United States. Such pro-

ceedings have been suspended pending the outcome of the subject appeals.

The important point here is that, on many of the tracts in question, the United States, acting largely by and through this Department, has, for some 25 years since the cancellation of the oil shale placer claims, exercised exclusive control over the land and has permitted third parties to acquire rights therein. In view of these facts, the assertion on appeal that the United States or the Secretary [52] of the Interior has recognized the validity of these mining claims and has not taken action which is inconsistent therewith, is without support.

But even assuming, arguendo, that a long-standing continuous and consistent Departmental recognition of these claims is shown, such a showing would not entitle the appellants to patents on these claims. For reasons heretofore stated, the validity of these claims was not established by the decision of the Department in The Shale Oil Company case, supra, nor by any subsequent administrative or judicial action, and any administrative practice to the contrary would have been clearly erroneous. Administrative practice, however long-standing and consistent, is not controlling when it is clearly erroneous. County of Marin v. United States, 356 U.S. 412 (1958); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1945); Burnet v. Chicago Portrait Co., 285 U.S. 1 (1932); Webster v. Luther, 163 U.S. 331 (1896); Merritt v. Camoner, 137 U.S. 542 (1890); United States v. Graham, 110 U.S. 219 (1884); Swift Company v. United States, 105 U.S. 691 (1882). And see Solicitor's Opinion, 68 I.D. 372 (1961), and cases cited therein.

Furthermore, the application of doctrine of administrative practice or construction is ". . . restricted to cases in which the construction involved is really one of doubt *and where those to be affected* [53] *have relied on the practical construction, and rights have accrued by reason of such reliance.*" Studebaker v. Perry, 184 U.S. 258, 269 (1902).[21] (Emphasis supplied.) Here the appellants have attempted to demonstrate the existence of a long-

[21] See generally, Annot., 73 L. Ed. 322 (1928), and, Annot., 84 L. Ed. 28 (1939).

continued practice by this Department in recognizing the validity of their claims. In support thereof, they have submitted the documentation above-mentioned.[32] Yet there is no clear showing that any of the appellants knew of or relied upon any of these documents at the time they acquired an interest in their claims. Indeed, it appears that the existence of such documents became known to the appellants only after their claims were challenged and their patent applications rejected by the Land Manager in 1962. Under these circumstances, no rights have accrued to the appellants by reason of the alleged Departmental practice.

Summary

In summary, we have found (1) that the Secretary and his duly authorized agent, the Land Commissioner, had jurisdiction to enter upon inquiry as to the validity of oil shale placer claims under the [54] applicable statutes; (2) that they had the jurisdiction to construe such statutes in defining their authority; (3) that in the exercise of this function they may have erred in canceling claims including some of the claims upon which the patent applications in the present case are based; (4) that these cancellations were not appealed from by the appellants or their predecessors in interest; (5) that neither the appellants nor their predecessors in interest sought to attack these decisions for over 25 years. We conclude that, on the principles of res judicata, finality of administrative action, and laches, the said decisions of the Land Commissioner and the Secretary of the Interior are binding on the parties thereto and their successors in interest insofar as these claims were actually canceled in the original contest proceedings in which the then-owners of the claims were properly served with notice of contest and provided an opportunity for a hearing respecting the validity of the claim.

As heretofore mentioned, the following claims were canceled in contest proceedings in which the then-owners of the claims participated, thus eliminating any question

[32] See footnote 30, supra.

concerning the sufficiency of or defects in the issuance of notice:

Claim	Patent Application	Contest
Carbon Nos. 1-4	Colo. No. 030979	No. 12029
Elizabeth Nos. 1,2,4-12	Colo. No. 030979	No. 12029
Southeast	Colo. No. 028751	No. 12972
Northeast	Colo. No. 028751	No. 12972
Northwest	Colo. No. 028751	No. 12972
Oyler Nos. 1-4	Colo. No. 012327	No. 12039
Jack Pot Nos. 4-11	Colo. No. 045092	No. 13038

[55] As to these claims, the decisions of the Land Manager rejecting applications for patents are hereby affirmed.

As to all other claims involved in this appeal, the final order affirming or reversing the decision of the Land Manager will be held in abeyance pending a determination of the sufficiency of notice of contest in the contest proceedings in which the claims were canceled. The appellants holding such claims who wish to pursue the contention that their claims were canceled without compliance with the requirements of notice, are hereby granted 60 days within which to submit materials relating solely to such contention. Thereupon, a determination regarding the sufficiency of notice will be made and a final order entered on the appeal. If necessary, hearings will be ordered to resolve any factual questions which remain unresolved on the record. Appellants who do not submit such materials shall be considered to have conceded that the Departmental records accurately reflect the facts regarding the issuance of notice in the contest proceedings and the determination will be made on the basis of the present record.

This decision is rendered and the action herein set forth is taken pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348).

Frank J. (illegible)
Solicitor

[56]

APPENDIX A

Appeal No.	Appellant	Colorado Serial No.	Manager's Decision
A-29560	Union Oil Co. of California	07667	February 16, 1962
		09072	February 16, 1962
	Pacific Oil Company	012327	February 16, 1962
	Weber Oil Company	014671	February 16, 1962
	Tell Ertl	016334	February 16, 1962
	Tell Ertl Henry L. Price Silmon Smith Charles Holmes	016671	February 16, 1962
	Gabbs Exploration Company	018673	February 23, 1962
	Dwight S. Young	022459	February 16, 1962
	John W. Savage	022460	February 16, 1962
	Charles H. Prien	022461	February 16, 1962
	Barnette T. Napier Grace A. Savage Maude B. Farnum John W. Savage John R. Farnum, Jr. St. Clair Napier Catlin William H. Farnum, Jr. Joan L. Savage Neil S. Mincer	028751	February 16, 1962
	Energy Resources Technology Land, Inc.	029427	February 16, 1962
		029428	February 16, 1962
		031342	February 16, 1962

[57]

A-29560	Wastach Development Company Joseph B. Umbleby	030979	February 16, 1962
	John W. Savage	034270	February 16, 1962
		034271	February 16, 1962
	Harlan H. Hugg Dorothy D. Hugg	045092	February 16, 1962

APPENDIX B

(Circular No. 460) Manner of Proceeding in Contests Initiated Upon A Report By A Represenattive Of The General Land Office

Department of the Interior General Land Office Washington, D. C., February 26, 1916.

To Special Agents, and Registers and Receivers, United States Land Offices:

The following rules are prescribed for proceedings in contests initiated upon a report by a representative of the General Land Office. All existing instructions in conflict herewith are superseded:

1. The purpose hereof is to secure speedy action upon claims to the public lands, and to allow claimant, entryman, or other claimant of record, opportunity to file a denial of the charges against the entry or claim, and to be heard thereon if he so desires.

2. Upon receipt of a report this office will consider the same and determine therefrom whether the facts stated, if true, would warrant the rejection or cancellation of the entry or claim.

3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges in the manner and form hereinafter provided for, which notice must be served upon the entrymen and other parties in interest shown to be entitled to notice.

4. The notice must be written or printed and must refer to the letter from this office by initial and date, as authority for issuing the notice, and must state fully the charges as contained in said letter; also the number of the entry or claim, subdivision of land involved, name of entryman or claimant or other known parties in interest.

5. The notice must also state that the charges will be accepted as true, (a) unless the entryman or claimant

files in the local office within thirty days from receipt of notice a written denial, under oath, of said charges, with an application for a hearing, (b) or submits a statement of facts rendering the charges immaterial, (c) or if he fails to appear at any hearing that may be ordered in the case.

6. Notice of the charges may in all cases be served personally upon the proper party by any officer or person or by registered letter mailed to the last address of the party to be notified, as shown by the record, and to the post office nearest to the land. When it is necessary to serve notice on the unknown heirs of a person in interest, the same must be addressed to that person at his address of record and also at the post office nearest the land. Proof of personal service shall be the written acknowledgement of the person served or the affidavit of the person who served the notice, attached thereto, stating the time, place, and manner of service. Proof of service of notice by registered letter shall consist of the report of the register and receiver who mailed the notices, accompanied by the post office registry return receipts, or the returned unclaimed registered letters.

7. If a hearing is asked for, the local officers will consider same and confer with the Chief of Field Division relative thereto and fix a date for the hearing, due notice of which must be given entryman or claimant. The above notice may be served by registered mail. By ordinary mail, a like notice will be sent to the Chief of Field Division.

8. The Chief of Field Division will duly submit, upon the form provided therefor, to this office, an estimate of the probable expense required on behalf of the Government. He will also cause to be served subpoenas upon the Government witnesses and take such other steps as are necessary to prepare the case for prosecution.

9. The Government must appear with its witnesses on the date and at the place fixed for said hearing, unless there is reason to believe that no appearance on behalf of the Government will be required. The officer in charge of hearings must, therefore, keep advised, as far as possible, as to whether the defendant intends to appear at

the hearing. The Chief of Field Division may, when present, conduct the hearing on behalf of the Government.

10. If the entryman or claimant fails to deny the charges under oath and apply for a hearing, or to submit a statement of facts rendering the charges immaterial, or fails to appear at the hearing ordered without showing good cause therefor, such failure will be taken as an admission of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof, and the register and receiver will forthwith forward the case with recommendation thereon to the General Land Office and notify the parties by registered mail of the action taken. In cases finally closed upon default of claimant if application to reopen any case is filed with the register and receiver they will forthwith forward same with recommendations to the General Land Office.

11. Upon the day set for the hearing and the day to which it may be continued the testimony of the witnesses for either party may be submitted, and both parties, if present, may examine and cross-examine the witnesses, under the rules, the Government to assume the burden of proving the charges, unless otherwise ordered.

12. If a hearing is had, as provided in paragraph 11, the local officers will render their decision upon the record, giving due notice thereof, in the usual manner. When decision is adverse to the Government, notice thereof must be sent to the Chief of Field Division.

13. Appeals or briefs, if filed, must be in accordance with the rules, but need not be served upon the Chief of Field Division or Government representative in charge of the hearing.

14. The above proceedings will be governed by the rules of practice. All notices served on claimants or entrymen must likewise be served upon transferees or mortgagees.

Very respectfully,

Clay Tallman, Commissioner

Approved: Andrieus A. Jones,
First Assistant Secretary.

[59]

APPENDIX C-1

(Words illegible)

2 x 1 x S. A. C.

United States Department of the Interior General Land Office Washington 7/29/35

In Reply Please Refer to (word illegible) 1290989 "N" CRB Mountain States Mineral Land Company, et al.

Contest No. 11823 dismissed. Case closed. Instructions.

Register, Denver, Colorado.

Sir: July 10, 1930, adverse proceedings were directed against the validity of the Liberty No. 1, Oil Shale Placer, SE, Sec. 22, T. 2 S., R. 95 W., 6th P. M., on the charge that annual assessment work was not performed on the claim for the year ending July 1, 1930, and that work has not been since resumed.

After notice issued and answer denying the charges was duly filed, hearing was dul before a United States Commissioner at Glenwood Springs, Colorado, on June 11, 1932, at which the Government appeared by attorney and no other appearances were noted. April 12, 1933, you transmitted the record to this office without decision. [60] On June 3, 1935, the Supreme Court decided in the case of Ickes vs. Virginia-Colorado Development Corporation, that the United States has no right to declare oil shale placers null and void because of failure on the part of the claimants to perform annual assessment work thereon, and on June 24, 1935, the Department in the case of the Shale Oil Company, Denver, mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case, and overruled its previous decisions in conflict with the Supreme Court's decision.

From the foregoing it is clear that the adverse proceedings in this case are invalid for any purpose. Accordingly, contest No. 11823 is dismissed and the case is closed. Advise the parties hereof.

Several contest cases involving oil shale placers are now pending in your office. In view of the decisions referred to hereinabove, you are instructed to close out on your records and transmit to this office all contest cases involving solely the question of a failure to perform annual assessment work, and failure to resume work on oil shale placers prior to the date of a challenge by the United States to the valid existence of the claims, where no answer has been filed by the claimants. In all cases involving only the question of annual assessment work where (word illegible) has been filed by any of the contestees you will transmit the records to this office without action.

You will retain in your files, subject to further instructions from this office all contest cases involving oil shale placers wherein charges have been made involving other questions than that above stated, even if a charge has also been made in that regard.

In your response hereto refer to this letter by date and number.

Very respectfully,

Sgd. Fred W. Johnson
Commissioner.

LMN 7/18

[62]

APPENDIX C-2

Box 477, Grand Valley, Colorado. April 22, 1936
51A27 3-A110 Box 546145 1282120

Commissioner General Land Office, Washington,D.C.

Please advise the undersigned Ida Dere,why Lucy Agnes Oil Shale Claims Nos.1and2. (being N¼,N ½ and S ½ N ½ , Sec 4, Township 5 South R 95 West) should not be clear listed from the charge of failure to do and preform annual assessment work Being contest No. 11750 in keeping with and per tenor of your letter dated 7/29/35, which ordered the clear listing of Liberty Oil Shale Claim No. 1, being contest No. 11823, addressed to Register of Denver Land Office.These two claims were

valid existing claims on 2/25/20, with several years assessment work having since been done. The field Division Inspectors convinced me on or about the year 1927or 28,that it would be useless to go to the expense of answering the Government contest,but the Supreme Court Decision of 6/3/35, seemingly has set at naught all of these formrr challenges, where the only question was lack of assessment work.Please clear list my said claims or advise me what must be done to get them clear listed.

(Words illegible)

Yours Respectfully,

(Stamp illegible)

(Words illegible) Ida Dere
(Words illegible) Grand Valley,
Colorado

[63]

APPENDIX C-3

Address Only The Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington May 4 - 1936

In Reply Please Refer To 1283120 "N" CRB Information

Ida Dere, Box 477, Grand Valley, Colorado

Madam: Replying to your letter of April 22, 1936, you are advised the records of this office show that the Lucy Agnes Nos. 1 and 2 oil shale placers were declared null and void by this office on August 18, 1933, because of failure of the owners of the claims to file answer denying the charge that annual assessment work had not been performed on the claims for the year ending July 1, 1929, and that work had not been since resumed.

On June 3, 1935, the Supreme Court of the United States held in the case of Ickes vs. Virginia-Colorado Development Corporation, that the oil shale placer claimant,

a party in that case, lost no rights by failure to do annual assessment work on its claims and that such failure gave the Government no right to declare the claims null and void. It further held that proceedings brought by the Government based solely on such a charge went beyond the authority conferred by law and did not affect the validity of the claims. In view of this holding of the Supreme Court, this office considers that it would be unnecessary to revoke its previous decision holding the Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the title arising from the location of the claims.

Very respectfully

Fred W. Johnson
Commissioner.

4-30 mc

[65] APPENDIX C-4

In Reply Refer to: 1069641 "N"

United States Department of the Interior General Land Office Washington Jul 4 - 1944

Mr. W. Porter Nelson, 607 California Building, Denver 2, Colorado.

My dear Mr. Nelson: I have your letter of June 15 asking for the present status of the contest No. 12473 directed against the Sid Nos. 1 to 22 oil shale placer locations by our letter No. 1069641 of July 16, 1930.

The letter referred to directed new adverse proceedings against the locations mentioned on the charge "That annual assessment work to the value of $100 was not performed upon each or any one of the Sid Nos. 1 to 22 inclusive, oil shale placers for the year ending July 1, 1930, and that work has not been since resumed." The letter also directed service of notice of the charge on E. B. McNair and George W. Habberset, the record title holders of the locations.

On September 16, 1930, answer was filed in the Denver Land Office by E .B. McNair in which no denial is made of

the allegations contained in the charge, but contestee contended that the Sid Nos. 1 to 22 claims having been located prior to the leasing act of February 25, 1920, constituted valid claims existent February 25, 1920, and maintained in compliance with the laws under which they were initiated, etc.

By our letter of June 24, 1931, to the Register it was stated that as the answer merely objected to the charge without denying the allegations therein, the contestees were allowed 30 days from notice in which to file a proper answer or appeal to the Secretary of the Interior and that if no action was taken within the time allowed the locations would be declared null and void without further notice. On August 25, 1931, the Register reported no action taken and transmitted evidence of service consisting of registry return receipt signed by E. B. McNair July 24, 1931. Accordingly by our letter of October 12, 1931, to the Register the locations were declared null and void as to the interest therein of E. B. McNair and the Register was directed to serve new notice of the decision of July 16, 1930, on George W. Habberset. The records show that such notice was served October 24, 1931, and in his letter of December 1, 1931, the Register reported that no answer was filed by Habberset within the time allowed. Accordingly by our letter of January 7, 1932, to the Register it was held that "The failure of the contestee to file answer denying the charge is taken as an admission by him of the truth thereof, in view of which the Sid Nos. 1 to 22, inclusive, oil shale placer locations are declared null and void in their entirety and the United States has taken possession of the land within the claims for its own uses and purposes." The case was also closed by that letter.

[66] However, in the case of the Shale Oil Company (55 I.D. 287) the Department hold, in view of the decision of the Supreme Court in the case of The Virginia-Colorado Development Corporation (295 U.S. 639) that the adverse proceedings in that case, based on charges of failure to do annual assessment work must be held as without authority of law and void.

Very truly yours,

Fred W. Johnson
Commissioner.

[67] APPENDIX C-5

Address Only The Commissioner of the General Land Office

United States Department of the Interior General Land Office Washington Jul 17 1935

In Reply Please Refer To Denver 042108 "N" CRB Information.

Mr. Edward Altenberry De Beque, Colorado.

My dear Sir: Replying to your letter of June 25, 1935, addressed to the Register of the United States Land Office, Denver, Colorado, and referred here for reply, you are advised that on June 3, 1935, the Supreme Court of the United States held in the case of Ickes, Secretary of the Interior, vs. Virginia-Colorado Development Corporation that the oil shale claimant lost no rights by failure to do the annual assessment work on its claims, that such failure gave the Government no right to declare the claims null and void, and that the proceedings brought by the Government against the claims, based solely on that ground, went beyond the authority conferred by law and did not affect the validity of the claims. [68] Your entry is the only claim of record on the tract books of the land office and if any other persons claim the land it is incumbent on them to contest the entry, and should they do so the burden of proof that they have valid claims which have not been abandoned would be upon them.

In the event your homestead entry should be canceled after contest and hearing because of conflict with prior valid mining claims, you would have the right to apply for repayment of all fees and commissions paid by you in connection with your entry but no reimbursement will be made by the United States for any expenditures on improvements made for any purposes on the entry. So far as this office is concerned, no objection would be made by it to the removal of any such improvements by a homestead entryman after cancellation of his entry, but this should not be taken as authority for the removal of structures which are part of

the realty in violation of state laws and of the rights of other parties.

Very respectfully,

Fred W. Johnson
Commissioner.

7-16 edt

[69] APPENDIX C-6

The Secretary of the Interior Washington Oct 31 1935

The Honorable The Secretary of the Navy.

My dear Mr. Secretary: Reference is made to the letter of November 1, 1933, of Secretary Ickes, containing a list of oil shale placer mining claims, with descriptions of the land involved, situated within Naval Oil Shale Reserves Nos. 1 and 3 in Colorado and No. 2 in Utah, involved in adverse proceedings, and the status of each case.

The adverse proceedings involving all of the said claims were based upon a charge that annual assessment work had not been performed upon the claim or claims involved for a stated assessment year and that work had not been resumed thereon. You were informed in the above-mentioned letter that certain claims had been declared null and void in their entirety and others had been declared null and void to the extent of the interests of the parties served with notice, and that further action in all pending cases involving the question of assessment work on oil shale placers was suspended in this office pending a final decision in the courts upon the matter of the authority of this Department to attack the validity of oil shale placer claims upon the ground stated.

On June 3, 1935, the Supreme Court, in the case of Ickes vs. Virginia-Colorado Development Corporation, held that the United States is without authority to challenge the validity of an oil shale placer claim on account of failure to perform the annual assessment work, or to resume work, thereon. All previous action taken upon such charges in the cases referred to therefore is without effect and void. The status of the claims so far as this Department is concerned is that they are subsisting

claims which, if located on valid discoveries of mineral by qualified locators, aggregate the land against its subsequent withdrawal for Naval Oil Shale Reserves unless the claims have been abandoned.

Sincerely yours,

Charles West
Acting Secretary of the Interior.

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* * * *

[76] ANSWER

Defendant, Stewart L. Udall, Secretary of the Interior, by his attorneys, Lawrence M. Henry, United States Attorney, and Assistant United States Attorney, answers the complaint as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The United States, a sovereign not amenable to suit, is an indispensable party.

Third Defense

Defendant admits the allegations in the first 2 paragraphs of the introductory statement. Defendant is without information sufficient to form a belief with respect to whether the amount involved exceeds the sum of $10,000. The remaining allegations, in paragraphs 3 and 4 of the introductory statement, are conclusions of law which require no answer. Defendant specifically denies that the complaint establishes a cause of action within the grant of mandamus jurisdiction in 28 U.S.C. sec. 1361.

[77] First Claim for Relief

I. Defendant admits the allegations in paragraphs 1 to 10, inclusive, 12 and 15.

II. With respect to the allegations in paragraphs 11 and 13, the decisions referred to therein speak for themselves.

III. Defendant denies the allegations in paragraphs 14 and 17 to 20, inclusive. As applied to the allegations in the first claim for relief, defendant admits the allegations in paragraph 21.

IV. With respect to the allegations in paragraph 16, it is admitted that Umpleby and the other interested parties appealed to the Secretary from the decision of the Commissioner of the General Land Office dated July 23, 1930. On appeal, the Secretary, prior to the decision of the Supreme Court in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, affirmed the cancellation of the claims. The decision cancelling these claims was at no time thereafter recalled or vacated by the Department of the Interior. The allegations in paragraph 16 not herein specifically admitted are denied.

Second Claim for Relief

I. Defendant adopts his answers to paragraphs 1 through 15 of the first claim for relief as his answer to paragraph 1.

II. The allegations in paragraphs 2 and 3 are denied.

[78] III. With respect to the allegations in paragraph 4, defendant admits that patents covering some oil shale placer claims which had been declared null and void for failure to do assessment work may have been issued between 1935 and 1960. Defendant denies the allegations in the first sentence in paragraph 4 not herein specifically admitted. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in the second sentence of paragraph 4.

IV. Defendant denies the allegations in paragraphs 5, 7 and in the last sentence of paragraph 6. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in the first sentence of paragraph 6.

Third Claim for Relief

I. Defendant adopts his answers to paragraphs 1 through 15 of the first claim for relief and to paragraphs

2 through 6 of the second claim for relief as his answer to paragraph 1.

II. Defendant denies the allegations in paragraph 2.

Fourth Claim for Relief

I. Defendant adopts his answers to paragraphs 1 through 15 of the first claim for relief and to paragraphs 2 through 6 of the second claim for relief as his answer to paragraph 1.

II. Defendant denies the allegations in paragraphs 2 and 10.

III. With respect to the allegations in paragraph 3, defendant states that in May, 1954, a meeting was held at Rifle, Colorado, attended by representatives of the Department of the Interior and by [79] members of the general public having an interest in oil shale development. One purpose of this meeting was to discuss the additional sampling and assay work needed to permit increased reliability of oil shale reserve estimates. The allegations in paragraph 3 not herein specifically admitted are denied.

IV. With respect to the allegations in paragraphs 4 and 8, defendant states that in 1957 plaintiffs submitted some assay information to officials of the Department and that this assay information may have been used in preparing a small chart set out at page 15 of the Bureau of Mines Report of Investigations 5614. The submission of this assay information had nothing to do with any issue relating to the validity of plaintiffs' claims and its submission was not accompanied by any statement or indication that the assayed material had been removed from claims that had previously been held null and void. The allegations in paragraphs 4 and 8 not herein specifically admitted are denied.

V. The allegations in paragraph 5 are admitted.

VI. With respect to the allegations in paragraph 6, defendant admits that in 1959 and 1960 letters were written to the Supervisor, U. S. Geological Survey, and to the then Secretary of the Interior, which letters objected to the formation of a federal oil and gas unit that would include claims described in a pending patent ap-

plication. Defendant denies that plaintiffs were the owners of valid oil shale placer mining claims.

VII. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in paragraphs 7 and 9.

[80] Fifth Claim for Relief

I. In response to paragraph 1, defendant adopts his answers to the corresponding allegations in the first, second and fourth claims for relief.

II. Defendant denies the allegations in paragraphs 2 and 3.

Fourth Defense

The oil shale placer mining claims, with respect to which plaintiffs filed a patent application on September 8, 1959, were originally located in 1920 or earlier years. These claims were held null and void on November 29, 1930. Thereafter, no action was taken by plaintiffs to challenge the decision of November 29, 1930, nor was an application for a patent filed until September 8, 1959, forty years after filing of the claims and twenty-nine years after they were declared invalid. In the meantime, the United States, relying on the established invalidity of the claims, has entered into oil and gas leases covering the same areas and has otherwise administered the property as being free and clear of plaintiffs' claims. In view of the foregoing, plaintiffs, under ordinary principles of laches and estoppel, are estopped to maintain the present suit.

Wherefore, defendant demands that the complaint be dismissed.

Lawrence M. Henry
United States Attorney

James P. McGruder
Assistant United States
Attorney

Filed September 11, 1964

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* * * *

[232] JUDGMENT

This action was tried to the Court and the Court on December 21, 1966, filed a memorandum opinion and order.

It Is Ordered, Adjudged, and Decreed:

1. The decision by Solicitor of the Department of Interior on April 17, 1964, in Union Oil Company of California, et al., 71 I.D. 169 (1964), is reversed and is void and of no effect whatever as to the unpatented mining claims involved in this case which are located in Garfield County, Colorado, described as Carbon Nos. 1 through 5 and Elizabeth Nos. 1, 2, and 4 through 12.
2. The action by the Department of Interior, in a contest proceeding, Contest No. 12029, initiated by the Department in 1929, in which the above were declared invalid for failure to perform annual assessment work is void and of no effect whatever.
3. That Mineral Application Colorado 030979 for the patenting of the mining claims listed in paragraph 1 of this judgment is reinstated and remanded.

Dated, this 1st day of March, 1967.

By the Court:

William E. Doyle
United States District Judge

Approved as to form:

Fred M. Winner
Attorney for Plaintiffs

Lawrence M. Henry
United States Attorney for the
District of Colorado.

By David I. Shedroff
Assistant United States Attorney.
Attorneys for Defendant.

Filed March 1, 1967

[233] NOTICE OF APPEAL

Notice Is Hereby Given that the above-named defendant by its attorneys, Lawrence M. Henry, United States Attorney for the District of Colorado, and Richard T. Spriggs, Assistant United States Attorney for the District of Colorado, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered herein by the United States District Court for the District of Colorado on the 1st day of March, 1967.

April 26, 1967.

Lawrence M. Henry
United States Attorney for the
District of Colorado

By Richard T. Spriggs
Assistant United States
Attorney for the District
of Colorado
Denver, Colorado 80202

Filed April 26, 1967

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* * * *

[237] CLERK'S CERTIFICATE

I. G. Walter Bowman, Clerk of the United States District Court for the District of Colorado, do hereby certify the foregoing pages numbered one (1) to two hundred thirty-six (236) inclusive, are the original pleadings, Orders, papers, and exhibits, in a case lately pending in this Court, wherein, Joseph B. Umpleby and Wasatch Development Company were plaintiffs, and Stewart L. Udall, Secretary of the Interior was the defendant, in Civil Action 8685.

In Testimony to the above, I do hereuno sign my name and affix the seal of said Court at the City and County of Denver, in said District, this 3rd day of October, 1967.

(Seal) G. Walter Bowman, Clerk

Filed May 16, 1968

CASE NO. 9583

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Pleas and proceedings before the Honorable William E. Doyle, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

BARNELLE T. NAPIER, GRACE A. SAVAGE, JOAN L. SAVAGE, MAUDE B. FARNUM, ST. CLAIR NAPIER CATLIN, WILLIAM H. FARNUM, JR., JOHN R. FARNUM, JOHN W. SAVAGE,and NEIL S. MINCER, GARDNER C. CATLIN, and ELIZABETH YOUNG FARNUM HINDS, PLAINTIFFS,

VS.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DEFENDANT.

No. 8691 Civil

[1] COMPLAINT

Plaintiffs, for cause of action herein, and for their Complaint, allege:

1. Plaintiffs, Barnette T. Napier and Grace A. Savage, are citizens of the State of California. Plaintiffs John L. Savage, Maude B. Farnum, St. Clair Napier Catlin, William H. Farnum, Jr., John R. Farnum, John

W. Savage and Neil S. Mincer, are citizens of the State of Colorado.

2. The defendant, Stewart L. Udall, here sued in his official capacity, is the duly qualified and acting Secretary of the Interior of the United States, having his official place of business at the seat of government in Washington, D. C., and as Secretary, is charged with the control, direction and supervision of all officers and employees of the Department of the Interior, the administration and enforcement of all laws relating to the public lands and to mining claims thereon, and the issuance of rules and regulations relating thereto.

3. This action arises under the Constitution, more particularly the Fifth Amendment, and the laws of the United [2] States, including 30 U.S.C. Sections 22-38, pursuant to which plaintiffs claim vested rights in and to certain oil shale placer mining claims, and involves both the rights of plaintiff to enjoy and possess said mining claims without regard to certain unauthorized and invalid Department of the Interior Contest proceedings hereinafter set forth, and the duty of the defendant owed to the plaintiffs to administer the laws under which plaintiffs claim said mining claims upon a proper construction of those laws, and more particularly to require defendant to issue land patents to plaintiffs to the mining claims involved in this action. The matter in controversy, exclusive of interest and costs, exceeds in value the sum of $10,000.00. Jurisdiction of this Court is invoked under 28 U.S.C. Sections 1331, 1361 and 1391; and under the Administrative Procedure Act (5 U.S.C. Sections 1001-1011).

4. This is an action to obtain an Order and a Judgment of this Court requiring the defendant to discharge his duty under the Mining Laws of the United States according to the requirements of those Statutes as interpreted by the Supreme Court of the United States.

5. Plaintiffs are the owners of the Northwest Placer Mining Claim, being the N½NW¼ and the SW¼NW¼ of Section 27, containing 120 acres, the Northeast Placer Mining Claim, being the NE¼ of Section 27, containing 160 acres, and the Southeast Placer Mining Claim, being

the SE¼ of Section 27, containing 160 acres, all in Township 7 South, Range 98 West of the 6th Principal Meridian, in the County of Garfield, State of Colorado.

6. That the District Court in and for the County of Garfield, State of Colorado, entered a decree quieting title in the above described claims in the plaintiffs herein on December 4, 1957, which decree is recorded in Book 305, at Page 554 of the records of Garfield County, Colorado.

7. That plaintiffs made application for mineral patent (M.E. C-028751) on June 1, 1959, and made payment of the purchase [3] price for the said oil shale placer mining claims to the United States Land Office on October 30, 1959. Plaintiffs have fully complied with all applicable laws and regulations and are entitled to have a patent issued to them covering said mining claim.

8. In 1931, the defendant's predecessor in office instituted and thereafter conducted Contest No. 12972 against the vested rights in and to the mining claims referred to in Paragraph 7 above, owned by plaintiffs and their predecessors in interest. The defendant's predecessors in office acted in this Contest through subordinate agents, including the Commissioner of the General Land Office and the Register of the Denver Land Office, all of whom were exercising the authority of the defendant's predecessors in office and were subject to their supervision and control at all times. The said Contest proceeding was based solely upon the charge that annual assessment work in the amount of $100.00 had not been performed upon or for the benefit of the above mining claims.

9. In initiating and conducting said Contest, the subordinate agents purported to act pursuant to Departmental Circular of February 26, 1916 (Circular No. 460) "Manner of Proceeding in Contest Initiated Upon a Report by a Representative of the General Land Office", 44 L.D. 572. The Commissioner and the Register, named as Contestees in the Contest persons they regarded as being the then owners of the mining claims and purported to effect service of Contest upon these Contestees. On September 21, 1931, an Answer was filed on behalf of Mrs. B. T. Napier, Miss St. Clair Napier, B. T. Nap-

ier, Jr., C. R. McCarthy, and W. H. Farnum, On December 23, 1931, the Commissioner purported to declare the said mining claims null and void for failure to perform annual assessment work

10. In the first case brought in the courts to challenge the authority and jurisdiction of the Interior Department and to inquire on behalf of the United States whether annual assessment work had been performed for the benefit of a mining claim, the Supreme Court of the United States held in Wilbur v. Krushnic, 280 U.S. 306 (1930), that failure to do annual assessment [4] work did not authorize the defendant's predecessors in office to declare mining claims null and void.

11. The Supreme Court of the United States in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935), held that no charge of failure to perform assessment work regardless of whether performance of the work had been resumed, could serve as a basis for invalidating mining claims, and that the Department's challeges of oil shale claims for failure to perform assessment work, its institution and conduct of Contest based on failure to perform assessment work, and its decisions such as that in Contest No. 12972 declaring claims null and void for failure to perform annual assessment work, went beyond the authority conferred by law upon the defendant's predecessors in office.

12. Following the decision in Ickes v. Virginia-Colorado Development Corp., supra, the defendant's predecessor in office decided and declared that all prior decisions declaring mining claims null and void for failure to perform assessment work, including Contest No. 12972, were null and void and had no effect upon the validity of mining claims. Such decision was publicly evidenced by among other things, the Department's decision in The Oil Shale Co., 55 I.D. 287 (1935), overruling all decisions holding the Department had jurisdiction to challenge mining claims for non-performance of assessment work and expressly recalling and vacating the Departmental instructions authorizing the renewal of assessment work Contests following the decision in Wilbur v. Krushnic, supra, in 1930. Pursuant to these decisions,

Contest No. 12972 was dismissed and closed adversely to the United States.

13. At no time prior to the termination of Contest No. 12972 had any of the owners of the above mining claims or anyone else made application to the defendant's predecessors in office for patents for the claims or for any other interests in the lands covered by the claims. The defendant's predecessors in office and their subordinates were therefore without authority of [5] law to enter upon said Contest and the Commissioner's decision in Contest No. 12972 was and is invalid.

14. The defendant and his predecessors in office have at all times lacked authority to inquire or decide whether assessment work has been performed. Consequently, the actions of the defendant and his predecessors in office in instituting Contest No. 12972 and in purporting to cancel the said mining claims referred to herein for failure to perform annual assessment work, were and are null and void and of no force or effect.

15. Subsequent to plaintiffs' filing of Patent Application on June 1, 1959, and payment of the purchase price on October 30, 1959, defendant and his predecessors in office were favorably processing said patent application until February 16, 1962, when the Manager of the Colorado Land Office of the Bureau of Land Management issued a decision, rejecting the Patent Application for said mining claims. A copy of said decision is marked as Exhibit "A" and attached hereto, incorporated herein by reference, and made a part hereof. The Manager's decision for the first time asserted on behalf of the defendant that decisions in the old assessment work contest barred the patenting of the mining claims involved in such Contests.

16. On appeal from the Manager's decision, the Solicitor of the Department of the Interior, acting pursuant to the direction and with the express authorization of the defendant, ruled on April 17, 1964, that although the decisions in the old Contest proceedings were erroneous in law, the defendant would now and in the future assert decisions in the assessment work Contests to bar the patenting of mining claims and by said deci-

sion, rejected the application of plaintiffs herein for patent to said claims.

17. At the time of instituting Contest No. 12972, defendant's predecessors in office, or their agents, served only those then owners of the claims who filed answer and did not serve the remaining owners of the claims either personally with notice of the Contest, nor did they follow the applicable [6] Departmental procedures for service of notice of Contest, which were set out in Circular No. 460. Only part of the Contestees ever entered in appearance in the Contest. At no time did the Department obtain personal jurisdiction over the remaining Contestees in said Contests. The decisions in the said Contests were and are of no force and effect. All Contestees and all the then co-owners of the said mining claims were indispensable parties without whose presence no valid judgment in said Contests affecting said claims could be entered.

18. After the said Supreme Court decision in Ickes v. Virginia-Colorado Development Corp., supra, the defendant's predecessors in office decided that all prior decisions invalidating oil shale claims for failure to perform annual assessment work, including the decision in Contest No. 12972, were null and void and had no effect on such claims.

19. During the period 1935 through 1962, the defendant, his predecessors in office and officials and employees of the Department of the Interior repeatedly and publicly affirmed that the decisions in the assessment work Contest proceedings, including Contest No. 12972, were void and of no effect and did not operate to invalidate or otherwise adversely affect the interests of the plaintiffs, their predecessors in interest and others similarly situated.

20. During the period 1935-1962, the defendant and his predecessors in office issued land patents covering at least 74,000 acres of oil shale claims which had been declared null and void in assessment work proceedings such as those here involved and which were in all respects a fact in law the same as the said mining claims herein referred to above, with full knowledge that such

contest proceedings had resulted in decisions adverse to the claims. The Department's consistent practice of issuing patents for oil shale claims which had purportedly been invalidated by assessment work proceedings, was widely known throughout the area in which the claims were located, and was known both to the [7] plaintiffs and to their predecessors in interest.

21. By reason of the facts set forth herein, the Department has duly adopted a rule of law, which cannot be retroactively altered, that the assessment work contest, including Contest No. 12972, had no affect on the validity of mining claims.

22. From 1935 until 1962, the plaintiffs or their predecessors in interest, both knew of and relied upon the consistent policy of the defendant and his predecessors in office of treating the decisions in the assessment work contests, including the decision in Contest No. 12972, as nullities with no force and effect. During that period, the defendant and his predecessors, through their authorized subordinates, made repeated representations to the plaintiffs, their predecessors in interest, their representatives, advisors, and neighbors, that the assessment work contests had no effect on the validity of mining claims, and the plaintiffs have justifiably relied upon such representations in the expenditure of time and money in acquiring, improving, and perfecting their rights to the said mining claims.

23. Since 1935, the defendant and his predecessors in office have treated the decisions in the old assessment work proceedings, such as Contest No. 12972, as nullities. The arbitrary and unreasonable change of position by the defendant on April 17, 1964, as shown by the decision attached hereto, marked Exhibit "B", and by reference incorporated herein and made a part hereof, pursuant to which the legally erroneous and long overruled decision in Contest No. 12972 was for the first time asserted to attempt to defeat the vested property rights of the plaintiffs, and said decision violates the duty owed by the defendant to the plaintiffs fairly and equitably to administer the Statutes of the United States relating

to public lands and the rules and regulations of the Department of Interior.

24. Defendant is wrongfully withholding patents on said claims from plaintiffs. Defendant has arbitrarily and capriciously refused to issue patents to plaintiffs on said mining claims.

25. Plaintiffs have exhausted all of their administrative remedies within the Department of Interior in respect to the matters set forth in this Complaint.

[8] Wherefore, plaintiffs demand that the Court adjudge, decree and declare:

1. To issue its mandatory order compelling defendant to take such action as is necessary to issue patents to the plaintiffs to the said Northwest Placer Mining Claim, the Northeast Placer Mining Claim and the Southeast Placer Mining Claim.

2. That the patent applications of plaintiffs hereinbefore filed be processed by defendant without regard to Contest No. 12972.

3. To adjudge that the decision of the Commissioner in Contest No. 12972 dated December 23, 1931, and the orders, judgments or cancellations entered by defendant or his predecessors in said Contest are erroneous, invalid, and of no force or effect on the mining claims involved herein and now owned by the plaintiffs, and that the decision of the Land Office Manager (Exhibit "A") dated February 16, 1962, relative to M.E. C-028751 and the decision of the Solicitor of the Department of Interior (Exhibit "B") dated April 17, 1964, are erroneous, invalid and of no force or effect on the said mining claims involved herein and now owned by the plaintiffs.

4. For such other different and further relief as to the Court may seem reasonable, just and proper in the premises.

Schmidt & Van Cise

By Richard M. Schmidt, Jr.
Denver, Colorado 80202

Addresses of Plaintiffs:

Barnette T. Napier
135 Loralyn Drive
Arcadia, California

Grace A. Savage
9306 East Gallatin
Schoolhouse Road
Downey, California

Joan L. Savage and John W. Savage
Grand Valley, Colorado

[9]

Maude B. Farnum, St. Clair Napier Catlin,
William H. Farnum, Jr., John R. Farnum,
and Neil S. Mincer,
All of Glenwood Springs, Colorado

Filed July 15, 1964

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[66]

ANSWER

Defendant, Stewart L. Udall, Secretary of the Interior, by his attorneys, Lawrence M. Henry, United States Attorney, and Assistant United States Attorney, answers the complaint as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The United States, a sovereign not amenable to suit, is an indispensable party.

Third Defense

I. Defendant admits the allegations in paragraphs 1 and 2.

II. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in the next to last sentence of paragraph 3. The remaining allegations in paragraph 3 and all of the allegations in paragraph 4 are conclusions of law which require no answer.

III. The allegations in paragraph 5 are denied.

[67] IV. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in paragraph 6. Defendant denies that title has ever been quieted as against the United States.

V. Defendant admits the allegations in the first sentence of paragraph 7 and denies the allegations in the second sentence of that paragraph.

VI. With respect to the allegations in paragraphs 8 and 9, defendant admits that Contest No. 12972 was instituted in 1931 against the mining claims described in paragraph 7 of the complaint, admits that it was charged in that contest that annual assessment work in the amount of $100 had not been performed, admits that the contest was initiated in accordance with authorized procedure, admits that the then owners of the mining

claims were served and filed answers and admits that on December 23, 1931, the Commissioner of the General Land Office declared those claims null and void for failure to perform annual assessment work. Defendant denies the allegations in paragraphs 8 and 9 not herein specifically admitted.

VII. With respect to the allegations in paragraphs 10 and 11, defendant says that the decisions of the Supreme Court therein referred to speak for themselves.

VIII. Defendant denies the allegations in paragraph 12.

IX. Defendant admits the allegations in the first sentence of paragraph 13 and denies the allegations in the second sentence of that paragraph.

[68] X. Defendant denies the allegations in paragraph 14.

XI. Defendant admits that Exhibit "A", referred to in paragraph 15, is a true copy of a decision of the Manager of the Colorado Land Office, dated February 16, 1962, rejecting plaintiffs' patent application. Defendant denies the remaining allegations in paragraph 15.

XII. With respect to the allegations in paragraph 16, defendant says that the departmental decision of April 17, 1964, denying plaintiffs' patent application, speaks for itself. That decision declaring the claims null and void was at no time thereafter recalled or vacated by the Department of the Interior.

XIII. Defendant denies the allegations in paragraphs 17, 18 and 19.

XIV. With respect to the allegations in paragraph 20, defendant admits that patents covering some oil shale claims which had been declared void for failure to do assessment work may have been issued between 1935 and 1960. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the remaining allegations in paragraph 20 not herein specifically admitted.

XV. Defendant denies the allegations in paragraph 21.

XVI. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the

allegations in the first sentence of paragraph 22. Defendant denies the allegations in the second sentence of that paragraph.

XVII. Defendant denies the allegations in paragraphs 23 and 24.

[69] XVIII. Defendant admits the allegations in paragraph 25 as far as they relate to the application for a patent filed by the plaintiffs.

Fourth Defense

The oil shale placer mining claims, with respect to which plaintiffs filed a patent application on June 1, 1959, were originally located in 1920 or earlier years. These claims were held null and void by the Commissioner of the General Land Office in a decision dated December 23, 1931. No appeal was taken to the Secretary. Consequently, plaintiffs' predecessors in interest failed to exhaust their administrative remedies.

No action was taken by plaintiffs or their predecessors in interest to challenge the decision of December 23, 1931, and the application for a patent covering these null and void claims was filed more than forty years after filing of the claims and twenty-eight years after they had been declared invalid.

Wherefore, defendant demands that the complaint be dismissed.

Lawrence M. Henry
United States Attorney

James P. McGruder
Assistant United States Attorney

Filed September 11, 1964

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[97]

DEFENDANT'S STATEMENT

Pursuant to the Court's request, made at the conference on June 4, 1965, the following is defendant's statement of the preliminary issues:

1. Whether the Department of the Interior had subject-matter jurisdiction to render the cancellation decisions in Contests No. 12972 (Napier), No. 12029 (Umpleby) and Nos. 11,757, 11,729 and 11,761 (The Oil Shale Corporation).

2. Whether the defendant is required to declare said conte st decisions invalid by reason of the issuance of patents by his predecessor for some claims similarly situated or by reason of statements by some predecessor officials within the Department of Interior that similar decisions were without effect and void.

3. Whether said contest decisions were correct on the merits notwithstanding the decisions in Wilbur v. Krusnic, 280 U.S. 306, and Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639.

[98] 4. Whether in the Umpleby case the plaintiffs are barred by laches for failure to seek judicial review of the original contest decision at the time that decision was rendered.

5. Whether in the Napier case the plaintiffs are barred by failure of the original claimants to exhaust their administrative remedies in the original contest.

6. Whether the Oil Shale Corporation action is barred by failure of (a) the original ownders of the claim to exhaust their administrative remedies in the original contest; (b) the failure of plaintiffs in this action to first exhaust administrative remedies by applying for a patent or otherwise seeking administrative review by the defendant of the earlier decisions of his predecessor.

7. Whether the plaintiffs have any interest in the claim; and if so, whether any relief can be obtained going beyond their interest.

8. Whether the Court is limited to a review in the Napier and Umpleby actions of the 1964 determination

by the defendant that the claims are invalid by reason of said contest decisions, and to a review in The Oil Shale Corporation action of the determination in the contest decisions that the claims were invalid. In other words, defendant contends tht this Court could not, in any event, direct the issuance of patents and in so doing pass upon the validity of the claims on grounds that have not as yet been considered by the Interior Department.

9. Whether these cases can be tried de novo or whether judicial review must be limited to the administrative record before the Department of the Interior.

10. Whether the United States is an indispensable party in all proceedings.

Respectfully submitted,

Lawrence M. Henry
United States Attorney for the District of Colorado

By David I. Shedroff
Assistant United States Attorney

Thomas L. McKevitt
Attorney, Department of Justice
Washington, D. C.
Attorneys for Defendant.

Filed June 16, 1965

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* * * *

[256]

JUDGMENT

This action was tried to the Court and the Court on December 21, 1966, filed a memorandum opinion and order.

It Is Ordered, Adjudged, And Decreed:

1. The decision by Solicitor of the Department of Interior on April 17, 1964, in Union Oil Company of Cali-

fornia, et al., 71 I.D. 169 (1964), as modified by Supplemental decision dated December 13, 1965, A-29560 (Supp B), is reversed and is void and of no effect whatever as to the unpatented mining claims involved in this case which are located in Garfield County, Colorado, described as the Southeast,Northeast and Northwest mining claims.

2. The action by the Department of Interior, in a contest proceeding, Contest No. 12972, initiated by the Department in 1931, in which the above were declared invalid for failure to perform annual assessment work is void and of no effect whatever.

3. That Mineral Application Colorado 028751 for the patenting of the mining claims listed in paragraph 1 of this judgment, and the Southwest claim, is reinstated and remanded for action by Defendant in accordance with the views expressed by this Court in Opinion and Order dated December 21, 1966.

Dated this 1st day of March, 1967.

By The Court:

William E. Doyle
United States District Judge

Lawrence M. Henry
United States Attorney

By David I. Shedroff
Assistant United States Attorney
Attorneys for Defendant

Approved as to Form:

Richard L. Eason
Attorney for Plaintiffs

Filed March 1, 1967

[257]

Notice of Appeal

Notice Is Hereby Given that the above-named defendant by its attorneys, Lawrence M. Henry, United States Attorney for the District of Colorado, and Richard T. Spriggs, Assistant United States Attorney for the District of Colorado, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered herein by the United States District Court for the District of Colorado on the 1st day of March, 1967.

Dated April 26, 1967.

Lawrence M. Henry
United States Attorney for the
Distritc of Colorado

By Richard T. Spriggs
Assistant United States Attorney
for the District of Colorado
Denver, Colorado 80202

Filed April 26, 1967

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[261]

Clerk's Certificate

I, G. Walter Bowman, Clerk of the United States District Court for the District of Colorado, do hereby certify the foregoing pages numbered one (1) to two hundred sixty (260) inclusive, are the original pleadings, Orders, papers, and exhibits, in a case lately pending in this Court, wherein, Barnette T. Napier, Grace A. Savage, Joan L. Savage, Maude B. Farnum, St. Clair Napier Catlin, William H. Farnum, Jr., John R. Farnum, John W. Savage, and Neil S. Mincer, were plaintiffs, and

Stewart L. Udall, Secretary of the Interior was the defendant, in Civil Action 8691.

In Testimony to the above, I do hereunto sign my name and affix the seal of said Court at the City and County of Denver, in said District, this 3rd day of October, 1967.

(Seal) G. Walter Bowman, Clerk

Filed May 16, 1968

Case No. 9584

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Pleas and proceedings before the Honorable William E. Doyle, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

PENELOPE CHASE BROWN individually and as trustee, and THE OIL SHALE CORPORATION, PLAINTIFFS

vs.

STEWART L. UDALL, Secretary of the Interior, DEFENDANT

No. 9202, Civil

[1]

COMPLAINT

Plaintiffs Penelope Chase Brown, et al., by their attorneys, for their complaint, allege:

1. Plaintiff Penelope Chase Brown is a citizen of the State of Colorado. Plaintiff The Oil Shale Corporation is a corporation duly incorporated under and existing by virtue of the laws of the State of Nevada and has its principal office and place of business at 680 Fifth Avenue, New York City, New York.

2. The defendant, Stewart L. Udall, here sued in his official capacity, is the duly qualified and acting Secretary of the Interior of the United States, having his official place of business at the seat of the government in Washington, D. C. Under and by virtue of 9 Stat. 395; 5 U.S.C. § 485; 43 U.S.C. §§ 2, 1201; 1950 Reorganization Plan No. 3, 15 F.R. 3174, 64 Stat. 1262, the defendant is charged with the control, direction and supervision of all officers and employees of the Department of the Interior, the administration and enforcement of all laws relating to the public lands and to mining claims thereon, and the issuance of rules and regulations relating thereto.

[2] 3. This action arises under the Constitution, more particularly the Fifth Amendment, and the laws of the United States, including 30 U.S.C. §§ 22-38, pursuant to which plaintiffs claim vested rights in and to the Oyler Oil Shale Placer Mining Claims Nos. 1-4 ("the Oyler claims"). It involves the rights of the plaintiffs to enjoy and possess the Oyler claims and the duty of the defendant owed to the plaintiffs to administer the laws under which plaintiffs claim said rights upon a proper construction of those laws. The matter in controversy, exclusive of interest and costs, exceeds in value the sum of $10,000. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331, 1361, 1391 and 2201; and under the Administrative Procedure Act (5 U.S.C. §§ 1001-1011).

4. This action is brought (a) to obtain judicial relief with respect to decisions of the Department of the Interior (hereafter called "Interior") in Contest 12039, rendered in 1931 and 1932, purporting to invalidate the Oyler claims for failure to perform annual assessment work; (b) to obtain judicial relief with respect to the administrative decision of the defendant announced in Union Oil Company of California, et al., 71 I.D. 169 (1964), rejecting an application for patent to the Oyler claims on the ground of the decision in Contest 12039; and (c) to establish in full plaintiffs' rights to a patent to the Oyler claims and to obtain an order of this Court directing the defendant to issue such patent.

5. The Oyler claims are situated in Garfield County, Colorado, approximately six miles northeast of Grand Valley, and encompass portions of Sections 10, 11 and 12, Township 6 South, Range 95 West, 6th P.M., as follows:

Beginning at corner no. 1, Oyler No. 1, whence the common corner of secs. 10, 11, 14, and 15, T. 6 S., [3] R. 95W., 6th P.M., bears S. 15° 22′ 20″ W. 2032.95 feet; thence N. 89° 54′ W. 2629.6 feet to corner no. 2, Oyler No. 1; thence N. 0° 40′ E. 2640.0 feet to corner no. 3, Oyler No. 1; thence S. 89° 54′ E. 2598.9 feet to corner no. 4, Oyler No. 1; thence E. 6571.4 feet to corner no. 3, Oyler No. 4; thence S. 2640.0 feet to corner no. 4, Oyler No. 4; thence W. 3942.2 feet to corner no. 5, Oyler No. 2; thence S. 1320.0 feet to corner no. 6, Oyler No. 2; thence W. 2629.2 feet to corner no. 1, Oyler No. 2; thence N. 1320.0 feet to the point of beginning.

Plaintiff Penelope Chase Brown holds legal and full record title to the Oyler claims and has a substantial, if not the entire, beneficial interest therein; the remaining beneficial interest, if any, is held by the beneficiaries of a trust of which plaintiff Penelope Chase Brown is trustee. Plaintiff The Oil Shale Corporation has a lease and option to purchase the Oyler claims.

6. The Oyler claims were located on September 25, 1916, in full compliance with the applicable mining laws. The locations were perfected by discoveries of valuable deposits of oil shale, and location certificates for each of the claims were duly recorded. The locators thereby obtained fully vested mining rights of possession by virtue of the Congressional grants embodied in the mining statutes.

7. The Oyler claims were acquired in 1920 by Index Shale Oil Company ("Index"), a Colorado corporation organized by Harry L. Brown, the late husband of plaintiff Penelope Chase Brown, and his associates, Brown having theretofore developed a process for treating oil shale. Index, for which Brown acted as general manager, acquired an additional group of claims known as the Mt. Blaine claims, and from 1920 to 1938 Index constructed a plant and other buildings, built roads, constructed a

mine and commenced mining, installed an aerial tram to transport oil shale to the plant, and engaged in laboratory and processing work and other similar activities. In the course of this period over $200,000 was invested in the claims and in the operations of Index, including substantially all of the personal financial [4] resources of the Browns. The operations of Index were adversely affected by the Depression and in 1938 Index was obliged to sell part of its plant and equipment to satisfy financial obligations and ceased operations. In 1948 title to the Oyler claims and the Mt. Blaine claims was conveyed to the Browns in satisfaction of the substantial sums which they had advanced to Index.

8. Thereafter the Browns continued their efforts to develop the Oyler and Mt. Blaine claims in association with others under an agreement entered into in 1952. These efforts culminated in a 1955 agreement between the Browns and their associates and Pacific Oil Company ("Pacific"), under the terms of which the claims were conveyed to Pacific and Pacific undertook to apply for patents on the claims and to pay substantial sums to the Browns and their associates upon the issuance of patents. Pursuant to the 1955 agreement Pacific became the owner of the Oyler claims and in September 1955 filed an application for patent on the Oyler claims. Pacific thereafter filed an application for patent on the Mt. Blaine claims, and patent thereon issued in 1959.

9. Interior has on several occasions investigated the Oyler claims with a view to determining whether the claims were valid or subject to cancellation. The first such investigation was made during or prior to 1918 and resulted in the conclusion by Interior that the claims had been properly located and perfected by discoveries of valuable minerals and were fully valid claims. In the 1920's Interior conducted a second thorough examination of the Oyler claims and again concluded that the Oyler claims were in all respects valid, save for a technical question as to the effect of relocation certificates and the assessment work charge raised in Contest 12039 discussed below in paragraphs 11-14.

[5] 10. Another thorough investigation of the Oyler claims was made in the course of Interior's processing, which has been duly completed, of the patent application filed by Pacific in 1955. As a result of that investigation, Interior once again concluded that the Oyler claims were in all respects valid. The processing and review of the application established that Pacific was entitled as a matter of right to issuance of a patent. That patent was never issued, however, for in February 1962 the application for patent to the Oyler claims was rejected, without prior notice to Pacific, in a decision issued by the Manager of the Colorado State Office, on the ground that decisions in Contest 12039 had become effective, with the passage of time, to nullify the claims.

11. Contest 12039 brought against the Oyler claims was one of hundreds of quite similar administrative proceedings instituted by Interior during the latter 1920's and early 1930's in the course of a campaign conducted by Interior to cancel substantially all the then unpatented oil shale mining claims. In these contests Interior asserted that nonperformance of annual assessment work authorized it to annul oil shale claims.

12. Contest 12039 was commenced on or about June 28, 1929, but before any hearing had been held in Contest 12039 the Supreme Court ruled in Wilbur v. Krushnic, 280 U.S. 306 (1930), that Interior lacked authority under the mining laws to cancel mining claims for nonperformance of assessment work and that the Mineral Leasing Act had not conferred such authority. Thereafter, on or about July 22, 1931, an amended complaint was filed in Contest 12039 alleging not only nonperformance of assessment work but also nonresumption of the work. In a decision dated December 2, 1931 the Commissioner of the General Land Office [6] purported to declare the Oyler claims null and void for failure to perform assessment work, although recognizing that the Oyler claims were otherwise valid. On appeal, Assistant Secretary Edwards, on March 10, 1932, affirmed the Commissioner's decision in Contest 12039.

13. Thereafter, in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935), the Supreme Court

held that a failure to perform assessment work, whether or not performance of the work had been resumed, could not serve as a basis for invalidating mining claims. It held that Interior's challenges to oil shale claims for failure to perfor massessment work, its institution and conduct of contests based on failure to perform assessment work, and its decisions, such as those in Contest 12039, purporting to declare claims null and void for failure to perform assessment work, its institution and authority conferred by law upon the defendant's predecessors in office.

14. Following the decision in Ickes v. Virginia-Colorado Development Corp., supra, defendant's predecessor in office and his authorized subordinates decided and declared that all prior decisions declaring mining claims null nad void for failure to perform assessment work were themselves null and void and of no effect upon the validity of mining claims, overruled all decisions holding that Interior had jurisdiction to challenge mining claims for nonperformance of assessment work and expressly recalled and vacated the departmental instructions authorizing the renewal or continuance of assessment work contests following the Krushnic decision in 1930. Interior expressly recognized and acknowledged that the decisions in Contest 12039 adverse to the Oyler claims were null and void and without effect on the validity of the Oyler claims.

[7] 15. The defendant and his predecessors in office have at all times lacked authority to inquire or decide whether assessment work has been performed. Consequently, the decisions in Contest 12039 in 1931 and 1932 purporting to cancel the Oyler claims for failure to perform assessment work were and are null and void and of no force or effect.

16. During the period from 1935 through 1962, the defendant, his predecessors in office, and officials and employees of Interior repeatedly and publicly affirmed that the decisions in the assessment work contest proceedings, including Contest 12039, were void and of no effect and did not operate to invalidate or otherwise adversely affect the interests of the plaintiffs, their predecessors in interest or others similarly situated.

17. During the period from 1935 through 1962, the defendant and his predecessors in office issued patents covering at least 74,000 acres of oil shale claims, including many of the Mt. Blaine claims, which had purportedly been declared null and void in assessment work proceedings such as those here involved and which were in all material respects of fact and law the same as the Oyler claims, with full knowledge that such contest proceedings had resulted in decisions purportedly adverse to the claims, and in recognition of the invalidity and nullity of the prior contest proceedings and of the fact that the decisions therein had been vacated. Interior's consistent practice of issuing patents for oil shale claims which had purportedly been invalidated by assessment work proceedings was widely known throughout the area in which the claims were located and among those primarily interested in oil shale.

[8] 18. Interior has, by reason of the facts set forth above in paragraphs 14, 16 and 17, duly adopted a rule of law, which cannot be retroactively altered to the detriment of plaintiffs, that the assessment work contests, including Contest 12039, had no effect on the validity of mining claims.

19. Interior's consistent policy from 1935 to 1962, publicly and repeatedly announced, of treating the decisions in the assessment work contests, including Contest 12039, as nullities of no force and effect was justifiably relied on by the plaintiffs or their predecessor in interest in acquiring or improving or perfecting their rights to the Oyler claims.

20. Pacific duly perfected an administrative appeal from the Manager's decision of February 1962, rejecting the Oyler patent application, and on appeal duly objected both to the substance of the Manager's decision and to the manner in which it had been rendered—without notice of charges or an opportunity to be heard, and in violation of Interior's own regulations, the Administrative Procedure Act, and the Constitution. Two full years later, on April 17, 1964, the Solicitor, who had already participated in the proceedings in a prosecutorial man-

ner, sat in judgment thereon and affirmed the Manager's rejection of the Oyler patent application.

21. Thereafter, pursuant to the provisions of the 1955 agreement referred to in paragraph 8, above, Pacific transferred responsibility for further efforts to patent the Oyler claims to plaintiff Penelope Chase Brown and reconveyed the Oyler claims to her. Pacific no longer has any interest in this controversy, or the patent application, and the plaintiffs have succeeded to all of Pacific's interests therein.

22. Interior's resort to the assessment work decision [9] in Contest 12039 as the ground for rejection of the patent application for the Oyler claims, which was otherwise complete and regular in all respects, was the result of the adoption by Interior by early 1962 of a policy of opposing all oil shale patent applications, however meritorious. The assessment work contest decisions were regarded by Interior as a suitably sweeping device for the accomplishment of this policy inasmuch as such decisions had been rendered at one time or another against the great majority of all oil shale claims. Interior's decision to interpose the null and void assessment work decisions as an obstacle in 1962 to the patenting of oil shale claims, including the Oyler claims, was a deliberate decision, reflecting consultations and communications among numerous branches and officials of Interior including the Office of the Solicitor, which concurred in, approved and authorized this decision.

23. In furtherance of its policy of opposing oil shale claims and interposing obstacles to oil shale claimants seeking to vindicate their rights, Interior denied to representatives of Pacific permission to examine the files concerning Contest 12039 until pertinent documents therein had been removed. In furtherance of the same policy, Interior has engaged in arbitrary, unreasonable and dilatory procedural practices within the Department in order to discourage oil shale claimants and has attacked two pending oil shale patent applications which could not be subjected to the assessment work res judicata technique (because the claims had never been in-

volved in assessment work contests) upon novel and erroneous grounds as to the lack and "loss" of discovery.

24. The Oyler claims are fully valid mining claims. The patent application based thereon is in all respects regular and complete, and a proper showing has been made of the right [10] to a United States land patent for the lands embraced by the Oyler claims. Neither the decisions in Contest 12039 nor Interior's policy of opposing all oil shale patenting provide a lawful ground for interior's refusal to issue a patent to the Oyler claims. Interior has no other ground for its refusal. There has been no acquiescence by any private party in the decisions in Contest 12039 adverse to the Oyler claims, and no rights of third parties have intervened; the purported findings to the contrary in the Manager's decision of February 1962 are unsupported by anything in the record before the Manager.

25. The defendant is wrongfully withholding patent for the lands embraced by the Oyler claims, and has unreasonably delayed the favorable administrative action on the application therefor to which plaintiffs are entitled. Defendant has a duty promptly to issue the requested patent.

26. Necessary and appropriate administrative processing of the patent application has been completed. Plaintiffs have exhausted all their remedies within the Department of the Interior with respect to the patent application and with respect to the adverse decisions in Contest 12039.

Wherefore, the plaintiffs pray the Court:

1. To reverse the decision of the Commissioner of the General Land Office in Contest 12039 dated December 2, 1931, and to reverse the decision of the defendant's predecessor in office in Contest 12039 dated March 10, 1932, and to require the defendant to recall, vacate, and expunge from the records of the Department of the Interior any decisions, orders, judgments or cancellations entered by the defendant or his predecessors in office or their subordinates in Contest 12039 that were or purported to be adverse to the said Oyler claims.

[11] 2. To reverse the Department of the Interior ruling of April 17, 1964, in Appellate Proceeding A-29560, Union Oil Company of California, et al., 71 I.D. 169, insofar as it rejected the Oyler patent application.

3. To declare that the Oyler claims are fully valid claims, that the Oyler patent application is in all respects complete and regular, and that the defendant is under a duty to issue patent therefor.

4. To issue its mandatory order compelling the defendant promptly to issue patent for the Oyler claims.

5. To issue such other restraining orders, temporary injunctions, and permanent injunctions as may be required to protect the statutory and constitutional rights of plaintiffs, preserve the jurisdiction of the Court, and assure the due and fair administration of justice.

6. To grant such other and further relief as the Court deems reasonable, just and proper.

Dated: Denver, Colorado
June 14, 1965

Tweedy, Mosley, Aley & Young

By John B. Tweedy
Denver, Colorado

Clearly, Gottlieb, Steen & Hamilton
New York, New York
Of Counsel

Filed June 14, 1965

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[16]

ANSWER

Stewart L. Udall, Secretary of the Interior, by his undersigned attorneys, answers the complaint filed in this cause as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The United States, a sovereign not amenable to suit, is an indispensable party.

Third Defense

I. Admits the allegations of paragraphs 1 and 2 of the complaint.

II. Defendant is without knowledge or sufficient information to form a belief as to the truth of the allegation of paragraph 3 relating to the amount in controversy and therefore denies same. The remaining allegations of paragraph 3 and all of the allegations of paragraph 4 are conclusions of law and require no answer.

III. Defendant is without knowledge or sufficient information to form a belief as to the truth of the allegations of paragraph 5 and therefore denies same.

By way of further explanation of the prior sentence, defendant states that the legal description set forth in paragraph 5 is the legal description contained in Mineral Survey 20819 which is a part of the record in the proceeding for patent application. (As a matter of convenience all answers in the remainder of this defense relating to "the Oyler claims" will assume that the same have reference to the legal description as contained in paragraph 5 of the complaint.)

[17] IV. Admits that location certificates filed in Garfield County, Colorado, indicate that the claims were originally located on September 25, 1916, but defendant is without sufficient knowledge or information to form a belief as to the truth of said allegation of paragraph 6 of the complaint, and therefore denies same. Denies all other allegations of paragraph 6.

V. Defendant is without knowledge or sufficient information to form a belief as to the truth of the allegations of paragraph 7 and therefore denies same.

VI. Admits that Pacific Oil Company filed an application for patent for the Oyler Nos. 1-4 claims in 1955, and that a patent to the Mt. Blaine Nos. 1, 3, 4, and 5 claims was issued to the Pacific Oil Company in 1959. Defendant is without knowledge or sufficient information to form a belief as to the truth of the remaining allegations of paragraph 8 and therefore denies same.

VII. Answering paragraph 9 of the complaint, admits that the Oyler Nos. 1-4 claims have been investigated for partial validity on several occasions by employees of the Department of the Interior but denies that the Department has concluded that they were fully valid claims.

VIII. Answering paragraph 10 of the complaint, admits that the claims were examined as a consequence of a patent application filed by Pacific Oil Company, and that the patent application was rejected by a decision dated February 16, 1962, issued by the Manager, Denver Land Office, on the ground that the claims had been declared null and void as a result of contest number 12039, and that this declaration of invalidity is now res judicata. Denies the remaining allegations of this paragraph.

IX. Answering paragraph 11 of the complaint, admits that the Department of the Interior initiated adverse proceedings against unpatented oil shale claims in the latter 1920s and early 1930s challenging the validity of such claims whenever field examinations disclosed a failure to perform annual assessment work for such claims before the Supreme Court decision Wilbur v. Krushnic, 280 U.S. 306 (1930), was issued, and thereafter and until the issuance of the decision of Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935), whenever field examinations disclosed a failure to perform annual assessment work for such claims and the claimants had not then resumed such work. Denies that such contests were a part of a campaign conducted by the Department of the Interior to cancel substantially all the then unpatented oil shale mining claims.

[18] X. Answering paragraph 12 of the complaint, denies that the Supreme Court ruled in Wilbur v. Krushnic, supra, that the Department of Interior lacked authority under the mining laws to cancel mining claims

for nonperformance of assessment work and that the Mineral Leasing Act of February 25, 1920, had not conferred such authority. Technically, the Supreme Court held in the Krushnic case only that the Government could not challenge claims for failure to perform annual assessment work where such work had been resumed by the locator at the time the claims were challenged by the Government. Denies that the December 2, 1931, decision of the Commissioner, General Land Office, recognizes that the Oyler claims were valid except for the failure to perform assessment work. The Commissioner held that portions of the claims were null and void because the lands were made a part of a Naval Oil Shale Reserve before the mining claimants amended their location notices to include them in the claims. All of the above are matters of law. Admits the remaining allegations in said paragraph 12 of the complaint.

Further answering said paragraph 12, states that the decisions speak for themselves and that the same do not relate to "the Oyler claims" as described in paragraph 5 of the complaint, all as is more fully set forth in the Fourth Defense to this action, infra.

XI. Paragraphs 13 and 14 of the complaint consist of conclusions of law, and therefore require no answer; the decisions referred to speak for themselves. The legal significance of these decisions are stated in the proceeding referred to in paragraph 4(b) of the complaint. To the extent that paragraph 14 may be construed as an allegation of fact, the same is denied.

XII. Paragraph 15 consists of conclusions of law and therefore requires no answer.

XIII. Answering paragraph 16, of the complaint, denies that the Department ever rendered any decision holding that the decisions issued as a result of contest number 12039 were null and void and had no effect on the Oyler Nos. 1 to 4 claims. General statements were made regarding the effect of the assessment work contests. Several letters and other documents containing such statements were referred to in the Union Oil Company of California, et. al. decision, and are included in that decision as appendices. Denies that the Secretary

of the Interior, his predecessors and other officials and employees of the Department publicly and repeatedly declared that the [19] decisions resulting from contest number 12039 were void and of no effect.

XIV. Answering paragraph 17 of the complaint, admits that certain oil shale claims, including the Mt. Blaine Nos. 1, 3, 4 and 5, were patented between 1935 and 1960, some of which had been declared null and void as a result of contests alleging a failure to perform annual assessment work. Denies that all such claims were patented with full knowledge of the previous conte st proceedings and in recognition of the invalidity and nullity of the contests and of the fact that the decisions had been vacated. Denies that any patents were issued after July 6, 1960. Defendant is without knowledge or sufficient information to form a belief as to the truth of the remaining allegations of paragraph 17 and therefore denies same.

XV. Paragraph 18 of the complaint consists of conclusions of law and therefore requires no answer.

XVI. Denies all portions of paragraph 19 which constitute facts; the remainder of said paragraph consists of conclusions of law which require no answer.

XVII. Admits that Pacific Oil Company perfected an appeal from the Manager's decision of February 1962 and that the Department affirmed the Manager's decision rejecting its patent application. Denies all other allegations of paragraph 20.

XVIII. Defendant is without knowledge or sufficient information to form a belief as to the truth of the allegations of paragraph 21 and therefore denies same.

XIX. Denies the allegations of paragraph 22.

XX. Admits that at the early stages of the patent proceeding there may have been a denial of the "confidential" portions of the contest file; however, in any event the same were later made available. Denies all other allegations of paragraph 23.

XXI. To the extent that portions of paragraph 24 constitute statements of fact the same are denied; the remainder of said paragraph consists of conclusions of law which require no answer.

XXII. Paragraph 25 consists of conclusions of law, and therefore requires no answer.

[20] XXIII. Answering paragraph 26 of the complaint, admits that the plaintiffs have exhausted all their administrative remedies within the Department of the Interior with respect to the adverse decisions based on contest number 12039, including the decisions holding that the decisions resulting from that contest are res judicata. Denies that all the necessary and appropriate administrative processing of the patent application has been completed.

XXV. Further answering, defendant states that the remedy, if any is available to plaintiffs, is solely to determine the effect of the prior proceedings, and if incorrect, to remand the same to the defendant for further proceedings.

Fourth Defense

I. The original claim for Oyler No. 4 as shown on location certificate filed October 3, 1916, is for 160 acres in the form of a square stated to be NW¼NW¼ of unsurveyed Section 12, Township 6 South, Range 95 West.

II. That on December 6, 1916, Naval Oil Shale Reserve No. 1 was created, which reserve included what was then considered to be said unsurveyed Section 12, and what is in fact Sections 11 and 12, Township 6 South, Range 95 West.

III. That on November 15, 1918, an amended certificate was filed omitting the NW¼NW¼ of said unsurveyed Section 12, and substituting the NW¼SW¼ of said unsurveyed section therefor; that said omission and substitution constituted an abandonment of the NW¼ of the claim as originally staked and located; that by decisions dated December 2, 1931 and March 10, 1932, the Department of Interior held said November 1918 amendment ineffective, which decisions are now res judicata (aside from the issue of work); and that the abandoned NW¼ of oroginal Oyler Claim No. 4 could not thereafter be reinstated.

IV. That as a result of the materials contained in this defense, under no circumstances do the plaintiffs

have any rights to or interest in the NW¼ of Oyler No. 4 as originally located.

Fifth Defense

I. The original decision of the Commissioner, General Land Office of December 2, 1931, was affirmed by decision dated March 10, 1932. Insofar as this action purports, in part, to seek review of these decisions, the same is not timely taken and plaintiffs are barred by estoppel and laches.

II. That the decisions described in paragraph I of this defense are res judicata, and therefore the 1964 decision purportedly being appealed was correctly decided.

Lawrence M. Henry
United States Attorney for the
District of Colorado

By David I. Shedroff
Assistant United States Attorney
Attorneys for Defendant

Filed August 23, 1965

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[28]

DEFENDANT'S PRE-TRIAL STATEMENT

I. Statement of Facts

This suit involves oil shale claims located by undisclosed individuals in September, 1916. On March 10, 1932, the claims were declared null and void by the Department of the Interior on grounds of failure to perform assessment work. This decision was never vacated or reversed. In 1962 a patent application was rejected by the Manager on the grounds that the claims had previously been held invalid. This decision was appealed

and affirmed by the Secretary of the Interior on April 17, 1964. In their recent patent application, the plaintiffs contended that the Supreme Court had concluded in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, that failure to perform assessment work could not serve as a basis for invalidating mining claims. The Secretary held that this decision did not affect claims which had been declared invalid on the same ground but which were never vacated or annulled and that the invalidity of the claims was established as a matter of res judicata. This suit followed seeking judicial review.

II. Witnesses

Because this is a suit to review the decision of an administrative officer, it is defendant's contention that the suit must be tried on the basis of the administrative record. Accordingly, it is not contemplated that any witnesses will be called on behalf of defendant. However, should the plaintiffs be permitted to submit de novo testimony, the defendant may ask authority to call witnesses to meet such testimony.

III. Documentary Evidence

The burden of submitting the administrative record is on the plaintiff. However, the defendant will be prepared to submit the following:

[29] 1. A copy of decision of March 10, 1932, referenced in Statement of Facts.

2. The original or a copy of the patent application.

3. A copy of the Manager's decision refusing the patent.

4. A copy of the appeal papers filed in connection with the appeal to the Bureau of Land Management.

5. A copy of the Secretary's decision dated April 17, 1964. (71 I.D. 169).

The comments heretofore made with respect to the presentation of witnesses on behalf of the defendant also apply to the presentation of further documentary evidence.

IV. Contentions

Defendant's Statement ofContested Issues.

The defendant does not believe that there are any relevant factual issues. This case involves questions of law; however, the plaintiffs, in their complaint, contend that, after 1935, the decision declaring the claims void was cancelled. This is denied. Plaintiffs also contend that after the decision in the Krushnic and Virginia-Colorado Development Corp. cases a number of patents were issued to other parties whose claims had been previously rejected for failure to do assessment work. This is conceded although the number of patents in this category is not known. Plaintiffs also contend that the Department of the Interior developed a policy of conceding that all earlier adjudications declaring claims invalid for failure to do assessment work are null and void. This is denied.

Defendant's Statement of Issues.

1. Whether the Department of the Interior had subject-matter jurisdiction to render the cancellation decision in Contest No. 12039.
2. Whether the defendant is required to declare said contest decision invalid by reason of the issuance of patents by his predecessor for some claims similarly situated or by reason of statements by some predecessor officials within the Department of Interior that similar decisions were without effect and void.
3. Whether said contest decision was correct on the merits notwithstanding the decisions in Wilbur v. Krushnic, 280 U.S. 306, and Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639.

[30] 4. Whether in the instant case the plaintiffs are barred by laches for failure to seek judicial review of the original contest decision at the time that decision was rendered, and failure to seek extraordinary relief from the Secretary after the decision of the U. S. Supreme Court in Ickes, supra.

5. Whether the plaintiffs have any interest in the claim; and if so, whether any relief can be obtained going beyond their interest.

6. Whether the Court is limited to a review in this action of the 1964 determination by the defendant that the claims are invalid by reason of said contest decision.

7. Whether these cases can be tried de novo or whether judicial review must be limited to the administrative record before the Department of the Interior; and relief if any be limited to a determination whether the patent applications may be rejected on the res judicata doctrine, all other defenses to issuance of a patent, e.g., effect of amendment of claim, etc., being for the initial determination by the Secretary.

8. Whether the United States is an indispensable party in this proceeding.

9. Whether, even if some officials of the United States may have publicly announced or acted in a manner which indicated they believed all decisions declaring claims invalid for failure to do assessment work were null and void, such announcements or actions create a rule of property or constitute an estoppel against the United States. United States v. California, 332 U.S. 19, 39.

Respectfully submitted,

Lawrence M. Henry
United States Attorney for the
District of Colorado

By David I. Shedroff
Assistant United States Attorney
Attorneys for Defendant.

Filed October 19, 1965

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[31] Supplement to Defendant's Pre-Trial Statement

Pursuant to Court instructions, the following is a further exposition of Defendant's contention as to the scope of relief which may be granted in this action:

10. In the event this court should determine that the "assessment work" proceedings are invalid as a defense in this action, the same being the only matter determined by the Defendant in his decision, the review of which is the subject-matter of this litigation, the court must remand the cause to the Defendant for further proceedings, and this court is without authority to grant the portion of the prayer herein relating to the issuance of a patent. Federal Power Commission v. Idaho Power Co., 344 U. S. 17. Work, Secretary of the Interior v. Louisiana, 269 U. S. 250.

November 8, 1965.

Respectfully submitted,

Lawrence M. Henry
United States Attorney for the
District of Colorado.

By David I. Shedroff
Assistant United States Attorney.
Attorneys for Defendant.

Filed November 8, 1965

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[193]

JUDGMENT

This action came on for trial before the Court, Honorable William E. Doyle, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged:

1. That the decision of the Commissioner of the General Land Office in Contest 12039 dated December 2, 1931 and the decision of the Assistant Secretary of the

Interior dated March 10, 1932, affirming the aforesaid decision of the Commissioner of the General Land Office and any other decision in said contests purporting to declare the Oyler Placer Mining Claims Nos. 1-4 inclusive, null and void for failure to perform annual assessment work, were and are void, invalid and of no force or effect whatever upon the validity of the Oyler Claims or of any interest or interests in said claims or any of them insofar as those decisions relate to the failure to perform annual assessment work. Mineral Survey No. 20819 Colorado was made in connection with Mineral Application Colorado 012327 for patent to the aforesaid Oyler claims; on the basis of said survey, the claims may be described as comprising the following portions of Sections 10, 11 and 12, Township [194] 6 South, Range 95 West of the Sixth Principal Meridian, in Garfield County, Colorado:

Oyler No. 1

Oyler No. 1 Placer Mining Claim (hereinafter referred to as Oyler No. 1), as shown on the plat of Mineral Survey No. 20819 Colorado, certified by the Bureau of Land Management United States Department of Interior, under date of December 16, 1958 (hereinafter referred to as Mineral Survey No. 20819 Colorado), as a tract of land in Sections 10 and 11, Township Six (6) South, Range Ninety-five (95) West, Sixth P. M. beginning at corner number one (1) of said Oyler No. 1 which bears N. 15°22′20″E. a distance of 2032.95 feet from the Southwest corner of said Section 11; thence N. 89°54′W. a distance of 2629.6 feet to corner number two (2) of said Oyler No. 1; thence N. 0°40′E. a distance of 2640.0 feet to corner number three (3) of said Oyler No. 1; thence S. 89°54′E. a distance of 2598.9 feet to corner number four (4) of said Oyler No. 1; thence South a distance of 2640.0 feet to the point of beginning; which claim was originally described as the Northeast Quarter (NE¼) of Section Ten (10), Township Six (6) South, Range Ninety-five (95) West, Sixth P.M.

Oyler No. 2

Oyler No. 2 Placer Mining Claim (hereinafter referred to as Oyler No. 2), as shown in the plat of Mineral Survey No. 20819 Colorado as a tract of land in Section 11, Township Six (6) South, Range Ninety-five (95) West, Sixth P.M., beginning at a corner number one (1) of said Oyler No. 2 which bears N. 40°05′30″E. a distance of 836.87 feet from the Southwest corner of said Section 11; thence North a distance of 3960.0 feet to corner number two (2) of said Oyler No. 2 which is a point identical with corner number four (4) of Oyler No. 1; thence East a distance of 1309.2 feet to corner number three (3) of said Oyler No. 2 [which is marked by a galvanized pipe, with brass cap marked 3-Oyler 2, 2-Oyler 3]; thence South a distance of 2640 feet to corner number four (4) of said Oyler No. 2 which is a point which bears N.43°18′50″E. a distance of 2694.12 feet from the Southwest corner of said Section 11; thence East a distance of 1320.0 feet to corner number five (5) of said Oyler No. 2 which is a point identical with corner number three (3) Sur. No. 19942 Sheridan Placer No. 19; thence South a distance of 1320.0 feet to corner number six (6) of said Oyler No. 2 which is a point identical with [195] corner number Two (2) Sur. No. 19942 Sheridan Placer No. 18; thence West a distance of 2629.2 feet to the point of beginning; which Oyler No. 2 was originally described as the West Half of the Northwest Quarter (W½NW¼) and the North Half of the Southwest Quarter (N½SW¼) of Section Eleven (11), Township Six (6) South, Range Ninety-five (95) West, Sixth P.M.

Oyler No. 3

Oyler No. 3 Placer Mining Claim (hereinafter referred to as Oyler No. 3), as shown on the plat of Mineral Survey No. 20819 Colorado as a tract of land in Section 11, Township Six (6) South, Range Ninety-five (95) West of the Sixth P.M. beginning at corner number one (1) of said Oyler No. 3 which is a point identical with corner number four (4) of Oyler No. 2, which is a point which bears N.43°18′50″E. a distance of 2694.12

feet from the Southwest corner of said Section 11; thence North a distance of 2640.0 feet to corner number two (2) of said Oyler No. 3, which is a point identical with corner number three (3) of Oyler No. 2; thence East a distance of 2622.2 feet to corner number three (3) of said Oyler No. 3 [which is marked by a galvanized pipe with brass cap marked 3-Oyler 3, 2-Oyler 4]; thence South a distance of 2640.0 feet to corner number four (4) of said Oyler No. 3 which is a point which bears N.66°19′20″E. a distance of 4881.3 feet from the Southwest corner of said Section 11; thence West a distance of 2622.2 feet to the point of beginning; which Oyler No. 3 was originally described as the East Half of the Northwest Quarter (E½NW¼) and the West Half of the Northwest Quarter (W½NE¼) of Section Eleven (11), Township Six (6) South, Range Ninety-five (95) West, Sixth P.M.

Oyler No. 4

Oyler No. 4 Placer Mining Claim (hereinafter referred to as Oyler No. 4), as shown on the plat of Mineral Survey No. 20819 Colorado as a tract of land in Sections 11 and 12, Township Six (6) South, Range Ninety-five (95) West, Sixth P.M., beginning at corner number one (1) of said Oyler No. 4 which is the same as corner number four (4) of Oyler No. 3 which is a point which bears N.66°19′20″E. a distance of 4881.3 feet from the Southwest corner of said Section 11; thence North a distance of 2640.0 [196] feet [along the East boundary of Oyler No. 3] to corner number two (2) of said Oyler No. 4 which is a point identical with corner number three (3) of Oyler No. 3; thence East a distance of 2640.0 feet to corner number three (3) of said Oyler No. 4 [which is marked by a galvanized pipe with brass cap marked 3-Oyler 4]; thence South a distance of 2640.0 feet to corner number four (4) of said Oyler No. 4 [which is marked by a galvanized pipe with a brass cap marked 4-Oyler 4]; thence West a distance of 2640.0 feet along a line parallel to the North boundary of said Oyler No. 4 to the point of beginning; which Oyler No. 4 was originally described as the East Half of the Northeast

Quarter (E½NE¼) of Section Eleven (11) and the West Half of the Northwest Quarter (W½NW¼) of Section Twelve (12), Township Six (6) South, Range Ninety-five (95) West, Sixth P. M.

2. That the defendant, his successors and his or their agents and employees are forever enjoined and restrained from asserting against the plaintiffs or their successors in interest the validity of the aforesaid decisions insofar as they relate to the failure to perform annual assessment work.

3. That the decision dated February 16, 1962, of the Land Office Manager, Colorado State Office, Bureau of Land Management, Department of Interior, and the decision of the Solicitor of the Department of Interior dated April 17, 1964, affirming the aforesaid decision of the Land Office Manager sub nom. Union Oil Company of California, et al., 71 I.D. 169, are hereby set aside so far as they rejected Mineral Application Colorado 012327 for patent to the Oyler Placer Mining Claims Nos. 1-4 inclusive.

4. That Mineral Application Colorado 012327 for patent to the Oyler Placer Mining Claims Nos. 1-4 inclusive [197] is reinstated and remanded to the defendant for such further proceedings thereon as may be appropriate.

Dated at Denver, Colorado, this 1st day of March, 1967.

William E. Doyle
United States District Judge

The foregoing judgment is
approved as to form.

Maxwell Aley
Attorney for Plaintiffs.
Attorney for Defendant.

Filed March 1, 1967

[198]

Notice of Appeal

Notice Is Hereby Given that the above-named defendant by its attorneys, Lawrence M. Henry, United States Attorney for the District of Colorado, and Richard T. Spriggs, Assistant United States Attorney for the District of Colorado, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered herein by the United States District Court for the District of Colorado on the 1st day of March, 1967.

Dated April 26, 1967.

Lawrence M. Henry
United States Attorney for the
District of Colorado

By Richard T. Spriggs
Assistant United States Attorney
for the District of Colorado
Denver, Colorado

Filed April 26, 1967

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[202]

CLERK'S CERTIFICATE

I, G. Walter Bowman, Clerk of the United States District Court for the District of Colorado, do hereby certify the foregoing pages numbered one (1) to two hundred one (201) inclusive, are the original pleadings, Orders, papers, and exhibits, in a case lately pending in this Court, wherein, Penelope Chase Brown individually and as trustee, and The Oil Shale Corporation were plaintiffs, and Stewart L. Udall, Secretary of Interior was the defendant, in Civil Action No. 9202.

In Testimony to the above, I do hereunto sign my name and affix the seal of said Court at the City and County of Denver, in said District, this 3rd day of October, 1967.

(Seal)

G. Walter Bowman
Clerk

Filed May 16, 1968

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
JANUARY 1969 TERM

No. 9581.

District Court No. 8680 Civil.

STEWART L. UDALL, Secretary of the Interior, APPELLANT

v.

THE OIL SHALE CORPORATION, et al, APPELLEES

No. 9582.

District Court No. 8685 Civil.

STEWART L. UDALL, Secretary of the Interior, APPELLANT

v.

JOSEPH B. UMPLEBY, et al, APPELLEES

No. 9583.

District Court No. 8691 Civil.

STEWART L. UDALL, Secretary of the Interior, APPELLANT

v.

BARNETTE T. NAPIER, et al, APPELLEES

No. 9584.

District Court No. 9202 Civil.

STEWART L. UDALL, Secretary of the Interior, APPELLANT,

v.

PENELOPE CHASE BROWN, et al, APPELLEES.

Appeals From The United States District Court
For The District of Colorado

Edmund B. Clark, Attorney, Department of Justice, Washington, D.C. (Harold S. Harrison, Acting Assistant

Attorney General, Lawrence M. Henry, United States Attorney, Roger P. Marquis and Thos. L. McKevitt, Attorneys, Department of Justice, with him on the Brief), for Appellant.

Fowler Hamilton, New York City, N. Y., for Appellees, The Oil Shale Corporation, et al, and Penelope Chase Brown, et al; Fred M. Winner, Denver, Colorado, for Appellees, Joseph B. Umpleby, et al; Karl Ranous, Denver, Colorado, for Appellees, Barnette T. Napier, et al (Tweedy, Mosley & Young, Denver, Colorado, and Cleary, Gottlieb, Steen & Hamilton, New York City, N. Y., with them on the Brief).

Before PHILLIPS, HILL and SETH, Circuit Judges.

SETH, Circuit Judge.

[3] These are appeals in four consolidated cases wherein the United States District Court for the District of Colorado entered judgments for the plaintiffs. These plaintiffs were asserting that the Secretary of the Interior had no authority to deny applications for patents for oil shale mining claims on the ground that assessment work had not been done, or on the ground that the claims had previously been cancelled by the Department for the same reason. The Secretary in Union Oil Company of California, 71 I.D. 169, and 72 I.D. 313, had taken the position that he could deny such applications under his construction of the opinions of the Supreme Court in two cases involving departmental cancellation of claims for failure to do assessment work. The issue on this appeal is whether the trial court was correct in holding that these two previous decisions were binding in the present case, and that they had held that the departmental adverse proceedings and the cancellation orders there litigated were void as were all others entered on the same ground.

In three of the cases the plaintiffs sought relief by mandamus, and in the fourth case a declaratory judgment was sought.

[4] There follows a brief summary of the history of the four groups of claims in the consolidated cases:

The Oil Shale Corporation Claims (*Case No. 9581*):

These claims were located in December 1919 and January 1920. Contest proceedings were started against these claims by the Land Office in 1927 as Nos. 11,757, 11,759, and 11,761, for failure to do assessment work. In 1928 the Commissioner entered a decision that the claims were void. The decision was entered upon the failure of the contestees to appear and to answer the departmental assertion that assessment work was not done for the years 1921-1927. All the claimants of this group of claims have not made application for patents and were not parties in Union Oil Company of California, 71 I.D. 169.

Umpleby Claims (*Case No. 9582*):

These oil shale claims were located in 1918, were contested by the Land Office in No. 12,029 in 1929, and declared to be invalid and cancelled for failure to perform annual assessment work. Recently the claimants made application for patents which were rejected by the Secretary in Union Oil Company of California, supra.

Napier Claims (*Case No. 9583*):

These claims were located in 1918, were contested by the Land Office in No. 12,972 in 1931, and declared to be invalid and cancelled for failure to do assessment work. Patent applications for these claims were rejected by the Secretary in Union Oil Company of California, supra.

Brown Claims or Oyler Claims (*Case No. 9584*):

These claims were located in 1916, and in 1929 contested by the Land Office in No. 12,039, and declared invalid and cancelled for failure to do [5] assessment work. Patent applications were rejected by the Secretary in Union Oil Company of California, supra.

When these placer claims were located the federal mining laws provided that upon a discovery of valuble mineral deposits upon the public domain, a mining claim could be established simply by marking the location so that its boundaries could be easily followed. The mining districts and the states added some additional requirements, but it was not necessary to secure the consent of any federal officials nor to even advise them of the location. Thus the discoverer could himself take steps immediately to protect his find. This was, of course, a practical and effective method for the prospector and miner, and it served to develop the mineral resources as was intended by Congress.

The markings at the location and state required notices served to advise other miners of the claim when they would go no the same ground. After the location was made it was required that the claimant perform a certain amount of work each year to demonstrate that he was holding it in good faith and to further advise others interested in [6] the same ground that the claim was being asserted. Chambers v. Harrington, 111 U.S. 350. This assessment work was a requirement in virtually all of the mining districts by rule before the first federal statute on the subject was enacted. O'Reilly v. Campbell, 116 U.S. 418. Under the rules and the statute, if the work was not performed as and when required, the ground was then open to location by another person as if no prior claim had been staked. However, if no stranger so relocated the ground, the initial claimant could, after any failure to perform the work, resume assessment work and thereby the claim would not be subject to location by others. Belk v. Meagher, 104 U.S. 279. The assessment work year has been changed by Congress from time to time, and it has also provided moratorio for assessment work.

The basic federal requirements, the staking, and the assessment work were all acts relating to the ground itself and to create some condition which could be observed by persons seeking to locate claims in the same area. It was an inter-miner-prospector matter, and the federal government was not initially involved. The claims could, of course, be held indefinitely against others, and

the [7] Government, and be mined without doing more than making a valid location and performing the required assessment work. Upon the valid location, a possessory title passed from the United States to the locator which was a property right universally recognized. A patent could thereafter be sought by making application to the Land Office, but this was not a required step. The states in various ways supplemented the methods of marking and added a variety of notice, recording or filing requirements.

As to the assessment work aspect of claims made at the times these in question were made, it is apparent that the issue as to whether the work had been performed was a matter between rival claimants. It was precipitated by an overstaking and the resultant dispute as to whether the ground was then open for location. The issue was decided by the courts between the individuals concerned. 17 Stat. 93; see the older Departmental Regulations, 37 L.D. 757 (1909). Cameron v. United States, 252 U.S. 450. The current Regulations also expressly so provide. 43 C.F.R. § 3420.4.

It is important to consider the claims in question and the assessment work problems in this context of [8] practice, district rules, and statutes alluded to above. The Federal Mining Leasing Act of 1920 (30 U.S.C. § 193, 41 Stat. 451) removed a few minerals including oil shale from the traditional method of location, and it must also be examined in this setting. As to those minerals not included in the Act, the traditional method generally prevails today. See Brennan v. Udall, 379 F. 2d 803 (10th Cir.).

When the Mineral Leasing Act became effective, no new mining locations could be made for oil shale as there was substituted a leasing method. Thus those locators who already had made valid locations before the Act were not thereafter faced with the possibility of other locators overstaking their claims for oil shale if assessment work was not performed. Thus the assessment work requirement on pre-Mineral Leasing Act oil shale claims could not be "enforced" or tested by the acts of

a second oil shale locator versus a prior locator. The pre-Act claims were thus placed in a unique position.

The General Land Office soon after the passage of the Mineral Leasing Act undertook an ambitious program to eliminate the pre-Mineral Leasing Act oil shale claims upon [9] which assessment work had not been done. This program included the claims herein issue, and they were all cancelled by departmental action following contest proceedings directed against them for a failure to do assessment work. The program led to litigation to test the authority of the Department to cancel claims for such a reason. This culminated in Wilbur v. Krushnic, 280 U.S. 306, decided by the Supreme Court in 1930, and in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, in 1935. The claims in issue were cancelled before the decision in Virginia-Colorado.

It would not seem necessary to analyze at any length the two cases—Krushnic and Virginia-Colorado. They are treated by the trial court in its opinion at 261 F. Supp. 954, at 966, and in the literature on the subject of assessment work. 2 American Law of Mining, Title VII, § 7.1. It is sufficient to say that these cases held that the doctrine outlined above relative to assessment work and who could challenge locations for failure to do such work was not changed by the Mineral Leasing Act. The Court clearly held that the Department (Secretary) had no power or authority to cancel claims solely on the ground that [10] the assessment work had not been done.

At the time of the Supreme Court decisions cited above, the administrative cancellation proceedings in the Land Office had, of course, progressed to various stages in different proceedings. Thus some proceedings had concluded and orders had been entered cancelling the claims, while in others the proceedings were still in progress. But, as indicated above, cancellation orders had been entered in the contest proceedings directed against the claims here in issue. In 1935, following the Virginia-Colorado opinion, the Secretary in his decision, The Shale Oil Company, at 55 I.D. 287, stated that the adverse proceedings and the decision of the Commissioner can-

celling certain oil shale claims in the case before him for failure to perform assessment work were void. The decision for the Secretary said of the Virginia-Colorado case:

> "In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein in the instant case must be held as without authority of law and void. The above-mentioned decision of the Department in the *Virginia-Colorado Development Corporation* case and the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of *Francis D. Weaver* and *Federal Oil Shale Company* and other Departmental decisions in conflict with this [11] decision are hereby overruled. The Commissioner's decision is reversed and the record in the case remanded with instructions to reinstate the application and entry *in toto* and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clear-list the application for patent."

The Department for many years thereafter, as demonstrated by the record in these caes, adopted a policy that its prior cancellations and proceedings taken to cancel oil shale claims for failure to perform assessment work were invalid or were void. The expression of this policy continued until about the time of the decision in Union Oil of California, 71 I.D. 169, and 73 I.D. 313, which gave rise to this litigation.

It is well at this point to refer to the somewhat older (1920) case of Cameron v. United States, 252 U.S. 450. There the Supreme Court upheld the right of the Land Office to challenge mining claims on the ground that a discovery had in fact not been made. The fact of discovery was and is the basic statutory fact required to support any mining claim. It has been referred to as the source of title and what segregates the claimed ground from the public domain. It must have taken place before any title passes from the Government to the claimant. [12] The Court held in Cameron that the Land Office

could challenge the mining claims there concerned as to this fact of discovery, but this was the extent of the decision. The claims there sought to be established were so located as to cover the Bright Angel Trail leading into the Grand Canyon. The issue was discovery and not assessment work. Also in Best v. Humboldt Mining Co., 371 U.S. 334, the Court had before it in general terms a case similar to Cameron, supra, and expressed no new concepts in the authority of the Secretary. See also United States v. Coleman, 390 U.S. 599.

The Government on this appeal would present the issue very broadly, as being the authority of the Secretary of the Interior as to entries and locations on the public land. If the question is so broadly stated there can be found any number of decisions where reference is made to the wide extent of his duties as to the public domain. See Boesche v. Udall, 373 U.S. 472. However the issue cannot here be put in such broad terms. Instead the issue must be limited to the effect of the Krushnic and Virginia-Colorado cases upon the prior departmental cancellations of claims for failure to do assessment work. [13] There are some variations on this question and some related problems, but it is the basic issue.

It must be recognized that the departmental decision in Union Oil Company of California, supra, represents a reversal of the expressed policy of the Department which had prevailed since the Virginia-Colorado decision and The Shale Oil Company case, 55 I.D. 287, both in 1935. The record shows that this policy was expressed in correspondence, public statements, annual reports, and in official action. This official action includes the patenting of a substantial number of oil shale claims during this interval which had been previously cancelled by the Department for failure to do assessment work. This reversal of policy also represents a determination by the Secretary to have the Krushnic and Virginia-Colorado cases revisited. The Government in its brief states that the subject matter of this litigation is the same that was before the Secretary thirty-five years ago in proceedings leading to the Krushnic and Virginia-Colorado cases.

It is apparent that the private "enforcement" of the assessment work requirement through the overstaking by others of the ground covered by prior claims on which the [14] work had not been done was completely thwarted by the intervention of the Mineral Leasing Act as to competing locations for oil shale. The old claims were thus sheltered by the Act. However the ground could have been relocated by others for non-Mineral Leasing Act minerals had they been discovered (ignoring withdrawal problems). With the removal of relocation as the method to make the non-worked locations available, the Department undertook its campaign to cancel which was halted by the Krushnic and Virginia-Colorado cases, and has here again resumed its efforts. The Secretary in the Virginia-Colorado case argued the effect of the Act described above. The Government in its reply brief in the appeal before us states that the decision in Virginia-Colorado is "wrong" but suggests that since we are bound by it, "it should be confined to its exact facts . . . ."

We find no change in the authority of the Secretary since the Supreme Court decisions referred to above. There has been some relatively minor statutory change but it does not affect this issue. The Supreme Court held in Virginia-Colorado that the Secretary was acting outside his statutory authority when he cancelled the claims for the reason [15] he did. The Court said: "We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law." It was a clear and direct holding, and it followed the Krushnic decision and, of equal importance, it followed Cameron v. United States, 252 U.S. 450. The decision must be taken by us to hold that the Secretary was without power or authority under the laws to bring the adverse proceedings on the ground it did, and to so cancel the claims. This in the administrative area must be taken to mean his actions were void and of no legal effect. They were beyond his authority conferred by law, and this is the sole source of his power. Pan American Petroleum Corp. v. Pierson, 284 F.2d 649 (10th Cir.). The Secretary so understood

as indicated in the departmental decision in The Shale Oil Co., 55 I.D. 287, and by his later patenting of other cancelled claims. If his acts are so treated, the cancellations of the claims here concerned were of no effect and they stand as if no departmental action to cancel had been taken. Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C.Cir.), may have arrived at a somewhat different conclusion, but it relied upon an abandonment assertion. [16] It does not make much difference how this absence of administrative power is characterized, whether it is called lack of jurisdiction as the term is used with reference to the courts, or whether it is a lack of statutory power or authority, or lack of a duty covering the particular action attempted.

In West v. Standard Oil Co., 278 U.S. 200, the Court had before it an action against the Secretary of the Interior to enjoin proceedings in a local land office ordered by him to determine whether certain lands were known to be mineral at a certain time, and thus to attempt to determine whether title passed to the state under the Act of March 3, 1853. The Court found that the Secretary had no "affirmative duty" to the state or to a claimant. The Court said that Congress did give the Secretary the "power" to pass generally on the right of the state to the land. The Court said:

> "The broad power of control and supervision conferred upon the Secretary 'does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act.' Payne v. Central Pacific Railway Co., 255 U.S. 228, 236."

The Court concluded that the prior Secretary had acted [17] without authority, and in substance that his order was of no effect. The Court placed the determination of power on the finding of a "duty." Under the circumstances before us the Court had also found no duty within the statutes. It is reasonable to conclude from the West opinion that the action of the Secretary there was void as it was here.

Thus we must hold, as did the trial court, that under the prevailing decisional and statutory law, the initial administrative proceedings as such and also the cancellation of the claims here in issue were of no effect. The Supreme Court decisions were handed down some thirty years ago and Congress has not extended the power of the Secretary as to this particular matter as well it could because it has been seriously concerned with oil shale development. In any event, if it was then deficient the acts then taken were void. As to whether the Secretary can now refuse to patent by reason of gaps in annual assessment work we feel bound by the Supreme Court's decisions and by the absence of Congressional action. The Secretary must follow those decisions on this point.

The Government here argues in effect that the Secretary has all the powers mentioned in the Constitution [18] relating to public lands, but this cannot be. These powers are not in the Secretary, but are vested in Congress and he has what the statutes provide that he have and no more.

It must be borne in mind that these proceedings, derived as they are in part from the Union Oil of California case, are concerned only with the annual assessment work problem, and not with the many other hurdles which must be crossed by a claimant on the way to patent.

The Supreme Court cases removed the issue with which we are here concerned from the administrative arena and decided, and said expressly, that the basic power and authority of the Secretary was lacking as to his cancellations; and equally important was lacking as to his challenge to the claims and his adverse proceedings for the purpose sought. When such fundamental propositions were decided it made no difference to what extent the administrative action in the decided case had progressed or in any other like contest already disposed of. It further could make no difference whether the claimants took any further administrative action or not because what had gone before was void. The Secretary would here place the parties back in the various stages

of the administrative proceedings [19] where they were when the Department was stopped by the Virginia-Colorado case, and then start the machinery again and apply the doctrines of exhaustion of administrative remedies, etc. But, as stated above, the Supreme Court did more than interrupt the proceedings; it completely invalidated them as if no contests had commenced.

The Department proceeded initially on the proper course following the decisions as is shown in the record on this appeal. In many subsequent proceedings concerning other claims cancelled as these before us were, it ignored its prior administrative action; and it received applications to patent such claims, and patents were issued.

The land status in the area concerned has become somewhat complicated in that surface entries were received and processed; the Taylor Grazing Act has been administered in the same area as these and other claims of similar status; oil and gas leases have issued, and other entries have been processed by the Department. The Secretary advances this problem as an argument to support its refusal to patent, but these complications are not essentially different than in any area where there are a considerable number of unpatented mining claims. This is one of [20] the Secretary's basic problems in administering lands where the general mining laws are applicable, and all the data as to the locations and claims may not be in the records of the Land Office. This involved land status is not the doing of the mining claimants, as the Department has proceeded to receive these other entries and to process them regardless of the unpatented claims. It is not a question of laches on either side. Time and the pressure for land utilization have complicated the land use on the one hand and have added administrative problems on the other. The Secretary is certainly equal to solving these problems as they are everywhere present.

These cases on appeal are like a voice out of the past with mining locations dating from 1918, with the clearly established legal propositions directly applicable to them and the matter thought to be at rest, but here we are

some thirty or thirty-five years later and having progressed, or at least moved, somewhat out of the pick and shovel era faced with the same issues as to the same claims. It is, as stated above, the Virginia-Colorado issues and era revisited.

The appellees urge that we consider a contention [21] presented to the trial court that the Department cannot retroactively change a "rule." However it appears that the problem is a more fundamental one than rule making, and is instead a reluctance by the Secretary to continue to follow the Supreme Court's decisions as his predecessors have before, and to seek a new interpretation or to ultimately have the Court modify them. This issue we have considered above and we need not treat this as a separate matter.

The Government urges that the same issues are present in all four cases. The relief sought is basically in the nature of mandamus and directed to the Secretary's action in the Union Oil case. 28 U.S.C. § 1361 gives the District Court jurisdiction in these proceedings. The Act of 1962 subjected the officers and employees of the Government to such actions in all the United States District Courts. The nature of these actions was defined by this court in Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir.). See also Smith v. United States, 333 F.2d 70 (10th Cir.); Motah v. United States, 402 F.2d 1 (10th Cir.); Pan American Petroleum Corp. v. Pierson, 284 F.2d 649 (10th Cir.); Couch v. Udall, No. [22] 9834, December 4, 1968, —— F.2d —— (10th Cir.). As the legislative history indicates the intent was only to broaden the venue provisions of the prior Act. U. S. Code Cong. & Ad. News, 87th Cong., 2d Sess., page 2785.

For the reasons indicated above we must hold that the Krushnic and Virginia-Colorado decisions of the Supreme Court control. These decisions must also be taken to mean that the prior cancellations for failure to do assessment work were void and are still void. Thus the Secretary was again without authority to attempt to base his actions on the same ground.

AFFIRMED.

No. 9581

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

THE OIL SHALE CORPORATION AND ENERGY RESOURCES TECHNOLOGY LAND, INCORPORATED, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Before Honorable ORIE L. PHILLIPS, Honorable DELMAS C. HILL and Honorable OLIVER SETH, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER,
Clerk.

By GLADYS E. HOBBS,
Deputy Clerk.

JANUARY TERM, FEBRUARY 4TH, 1969

Before Honorable Orie L. Phillips, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges

Appeal from the United States District Court for the District of Colorado

9582

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

JOSEPH B. UMPLEBY AND WASATCH DEVELOPMENT CO., APPELLEES

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER,
Clerk.

By GLADYS E. HOBBS,
Deputy Clerk.

JANUARY TERM, FEBRUARY 4TH, 1969

Before Honorable Orie L. Phillips, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges

Appeal from the United States District Court for the District of Colorado

9583

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

BARNETTE T. NAPIER, GRACE A. SAVAGE, JOAN L. SAVAGE, MAUDE B. FARNUM, ST. CLAIR NAPIER CATLIN, WILLIAM H. FARNUM, JR., JOHN R. FARNUM, JOHN W. SAVAGE AND NEIL S. MINCER, APPELLEES

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER,
Clerk.

By GLADYS E. HOBBS,
Deputy Clerk.

JANUARY TERM, FEBRUARY 4TH, 1969

Before Honorable Orie L. Phillips, Honorable Delmas C. Hill and Honorable Oliver Seth

Appeal from the United States District Court for the District of Colorado

9584

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

PENELOPE CHASE BROWN, INDIVIDUALLY AND AS TRUSTEE, AND THE OIL SHALE CORPORATION, APPELLEE

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER,
Clerk.

By GLADYS E. HOBBS,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

No. 221, October Term, 1969

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

ORDER ALLOWING CERTIORARI—Filed October 13, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice White and Mr. Justice Marshall took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 368572 347

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Reasons for granting the writ	7
Conclusion	17
Appendix A: Court of Appeals Opinion	1a
Appendix B: Court of Appeals Judgment	19a
Appendix C: District Court's Opinion	21a
Appendix D: Opinion of the Secretary of the Interior	47a

CITATIONS

Cases:	
Avco Corp. v. *Aero Lodge 735*, 390 U.S. 557	9
Best v. *Humboldt Mining Co.*, 371 U.S. 334	8, 10
Boesche v. *Udall*, 373 U.S. 472	10
Brennan v. *Udall*, 379 F. 2d 803, certiorari denied, 389 U.S. 975	14
Callanan Road Co. v. *United States*, 345 U.S. 507	7, 8
Cameron v. *United States*, 252 U.S. 450	7, 8
Foltz v. *St. Louis & S.F. Ry. Co.*, 60 Fed. 316	9
Gabbs Exploration Co. v. *Udall*, 315 F. 2d 37, certiorari denied, 375 U.S. 822	15
Hamilton v. *Ertl*, 146 Colo. 80, 360 P. 2d 660	13
Hodgson v. *Midwest Oil Co.*, 17 F. 2d 71	16
Ickes v. *Development Corp.* (*Virginia-Colorado*), 295 U.S. 639	2, 5, 6, 7, 8, 9, 10, 13, 15, 16
Swift & Co. v. *United States*, 276 U.S. 311	8
Tehan v. *Shott*, 382 U.S. 406	10
United States v. *Williams*, 341 U.S. 58	9
West v. *Standard Oil Co.*, 278 U.S. 200	15
Wetzel v. *Minnesota Railway Company*, 169 U.S. 237	14
Wilbur v. *Krushnic*, 280 U.S. 306	4

352-158—69 —1

Statutes and Executive Orders: Page

Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq*---- 3

Taylor Grazing Act, 43 U.S.C. 315---- 12

30 U.S.C. 28---- 2, 13

Executive Order No. 5327, April 15, 1930---- 11

Executive Order No. 6016, February 6, 1933---- 11

Interior Decisions:

Interstate Oil Corp. et al., 50 L.D. 262---- 16

Kinney, E. C., 44 L.D. 580---- 16

Shale Oil Co., 55 I.D. 287---- 5

Standard Shales Prod. Co., 52 I.D. 522---- 16

Union Oil Company of California, et al., 71 I.D. 169-- 6

Union Oil Company of California, 72 I.D. 313---- 7

Miscellaneous:

Davis, *Administrative Law Treatise* § 18.10---- 7

Lindley, *Mines* (3d ed.) vol. 1---- 16

Moore, *Federal Practice* ¶ 60.25[2] (2d ed. 1968)---- 9

In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on February 4, 1969.

OPINION BELOW

The opinion of the court of appeals (App. A) is reported at 406 F. 2d 759.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1969 (App. B). On April 26, 1969, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including June 4, 1969, and on May 27 he granted a further extension to June 19, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a 1935 holding of this Court that the Secretary of the Interior had exceeded his authority in cancelling certain mining claims must be given retrospective effect as to other mining claims previously cancelled on the same ground and which were not reasserted until the 1950's.

STATEMENT

Respondents are the present owners of claims to oil shale mining locations in Colorado. These claims were cancelled by the Secretary of Interior in 1928-1931 when he determined that the then owners of the claims had failed to meet a statutory obligation to do assessment work—$100 annual labor or improvements on each claim—as required by 30 U.S.C. 28 (R. 412-415).[1] In 1935, this Court held that the requirement of assessment work could not be used as a ground for cancellation by the government, but was significant only for the purpose of determining rights to the claim as between competing prospectors. *Ickes* v. *Development Corp.* (*Virginia-Colorado*), 295 U.S. 639. The present claims were not involved in that case, and no attempt was made then, or until the late 1950's, to revive them (App. 68a, R. 3, 122). They remained cancelled on the Department's records. The issue posed in the present action, and resolved adversely to the Secretary in the courts below, was whether *Virginia-Colorado* had ren-

[1] References to the printed record in the court of appeals are designated "R."

dered the prior cancellations void, so that the Secretary was required to recognize the claims however tardily presented.

The claims were all located before 1920—necessarily so, since the Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*, provided that rights to the development of oil shale could thereafter be obtained only by leases under that Act. At the time, there was a great deal of public excitement about oil shale; the nation's known crude oil resources were severely limited, and it therefore seemed that oil shale would soon be required to satisfy the demand for petroleum products. Interest in oil shale flagged, however, when substantial deposits of crude oil were found; thousands of oil shale claims were abandoned and forgotten by the original locators. Before passage of the Mineral Leasing Act of 1920, failure to do assessment work meant that another prospector could locate the claim himself. When that Act withdrew the land from further location, however, the threat of "top-filing," tending to enforce the assessment work requirement, was no longer present. Given this fact, the sudden disappearance of interest in oil shale claims, and the congressional mandate to reserve oil shale land for leasing, the Secretary determined to treat the failure to do assessment work as forfeiting the claim, so that the land could be put to other uses in the public interest (R. 23–70).

Proceedings against such claims began in the late 1920's, and took on substantial proportions. Investigation showed more than 30,000 oil shale claims, em-

bracing more than 4,000,000 acres of public domain in Colorado, Utah and Wyoming, which were not being maintained by the performance of annual assessment work (R. 1526). In the fiscal year ending June 30, 1932, the Secretary declared 10,918 locations, embracing 1,294,500 acres, null and void; and in fiscal 1933, 11,146 locations embracing 1,448,980 acres were cancelled (R. 1592). It is apparent from the volume of claims disposed of that the great majority of the mining claimants must have defaulted, taking no action to protect their interest in what then appeared to be worthless property. Indeed, of the claims involved in this case, only the then holders of the claims now made by respondent Brown appealed the cancellation within the administrative process; when that administrative appeal was lost, no effort was made to seek judicial review.

The infrequency with which judicial review was sought is striking when it is considered that, when sought, it succeeded. In January, 1930, this Court held in *Wilbur* v. *Krushnic,* 280 U.S. 306, that the Secretary could not cancel a claim where assessment work had lapsed for a year, but had been resumed before any administrative action had been undertaken against the claim. That decision left open the question whether cancellation would be proper where the Secretary took affirmative action against a claim after a lapse in assessment work and before resumption. The Secretary promptly began to take such action, posting property with challenges to the claims when it was determined that assessment work had not been done during an immediately preceding year. The massive

and basically unopposed clearance of claims described above then took place.

Among the few who contested these proceedings were the claimants in *Virginia-Colorado, supra,* who appear to have omitted their assessment work for only fifteen months preceeding the Secretary's action, and who alleged in their papers that they stood ready to resume it but for the Secretary's cancellation of their claim. In 1935, as already indicated, they brought their challenge to this Court, which ruled that even in a contest brought prior to resumption of assessment work, failure to do that work for a year was not a valid reason to cancel the claim and that, in doing so, the Secretary "went beyond the authority conferred by law." 295 U.S. at 647. The Secretary promptly "overruled" the contrary administrative decisions, *The Shale Oil Company,* 55 I.D. 287, vacated pending cancellation proceedings, and for a time stood ready to reopen cancellations which had already been made final. It appears that only about 74,000 acres of the several million involved were reclaimed in this fashion (App. 24a).

With the recent revival of interest in oil shale, speculators and others have been buying up the old, cancelled claims, arguing as respondents did here that they could not effectively have been cancelled by action that "went beyond the authority conferred by law."[2] Three of the respondents applied to the Secre-

[2] Most of the claims involved in this case changed hands at low, speculative prices in the mid-50's; a few, in 1948; and another small portion appears to have remained in the hands of the original claimants or their descendants. (See, *e.g.*, App. 27a–80a.)

tary for patents on such claims. The Secretary rejected the applications (App. D., *infra*) on the ground that, while his predecessor may have erred in cancelling the claims in the late 1920's and early 1930's for failure to do assessment work, he did have jurisdiction over the subject matter and his acts therefore were not void. The Secretary recognized that he could revive the cancelled claims in the exercise of his supervisory authority, but, after the many years of asquiescence, declined to do so. He stated (*Union Oil Company of California, et al.*, 71 I.D. 169, 177; App. D, *infra*, pp. 59a–60a): "the decision nullifying the claim will be treated as conclusive and will not be reopened in the absence of a legal or equitable basis warranting reconsideration."

The fourth respondent, the Oil Shale Corporation, did not apply to the Secretary but sought a declaratory judgment in the United States District Court for the District of Colorado that the Secretary was required to issue patents on proper application for the ostensibly cancelled claims. The case was consolidated with the three challenges to the administrative action, and the district court found, contrary to the Secretary, that the patents should issue (App. C, *infra*).

The court of appeals affirmed (App. A, *infra*) on the ground that this Court's decision in *Virginia-Colorado, supra,* "must be taken by us to hold that the Secretary was without power or authority under the laws to bring the adverse proceedings on the ground it did, and to so cancel the claims. This in the administrative area must be taken to mean his actions were void and of no legal effect" (*infra,* p. 12a).

REASONS FOR GRANTING THE WRIT

1. The court of appeals' principal ground of decision was that the cancellations involved in this case were void, and hence subject to collateral attack, under this Court's holding in *Virginia-Colorado* that such cancellations "went beyond the authority conferred by law." 295 U.S. at 647. This reading is in conflict with the decisions of this Court on the scope of the Secretary's jurisdiction to decide questions involving the public lands, and if permitted to stand would seriously encumber his administration of those lands.

In general, administrative decisional action is a legal nullity, and thus subject to being ignored or to collateral attack, only in circumstances in which judicial action would similarly be void—a defect of process, fraud in the proceedings, or the absence of power in the agency to consider the question put. *Cameron* v. *United States,* 252 U.S. 450, 459–460; *Callanan Road Co.* v. *United States,* 345 U.S. 507, 512; Davis, *Administrative Law Treatise* § 18.10. In the present case, the asserted defect is in regard to the last of these, subject matter jurisdiction.[3] In asserting that the Secretary had no power to decide the cancellation issue in the early 30's, however, the Tenth Circuit confused the issue of power with the question whether the proper legal standards were applied in the exercise of that power.

[3] Regarding the question of notice, the Secretary has held that the old default proceedings are subject to reopening as to any locator for whom receipt of service is not adequately shown. *Union Oil Co. of California,* 72 I.D. 313.

It is clear that the Secretary possessed ample power of decision with respect to mining claims, including the power of cancellation.

> * * * [S]o long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. * * *

Cameron v. *United States, supra,* 252 U.S. 450, 460; see also, *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336. Indeed, the opinion in *Virginia-Colorado* itself recognizes that power in referring to the several grounds on which invalidation or cancellation *is* authorized by law: lack of discovery, fraud, abandonment, etc. 295 U.S. at 645. *Virginia-Colorado* decided only that the Secretary was not authorized to cancel for failure to perform assessment work; it had no occasion to decide whether his reliance on this erroneous ground rendered his action—and his similar actions in the thousands of defaulted cases—void. That reliance would have had such an effect only if the Secretary's power to decide the issue was thereby "destroyed." *Callanan Road Co., supra,* 345 U.S. 507, 512. Plainly, it was not. As this Court has said in similar circumstances involving the jurisdiction of federal courts,

> * * * [T]he error, if any, does not go to the jurisdiction of the court. The power to enjoin includes the power to enjoin too much. * * * [*Swift & Co.* v. *United States,* 276 U.S. 311, 331.]
>
> "Jurisdiction is the power to decide a justiciable controversy, and includes *questions of*

> *law as well as of fact." Binderup* v. *Pathe Exchange,* 263 U.S. 291, 305. Even the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction. *Chicot County District* v. *Baxter State Bank,* 308 U.S. 371, 376. See also *Stoll* v. *Gottlieb,* 305 U.S. 165; *M'Cormick* v. *Sullivant,* 10 Wheat 192. [*United States* v. *Williams,* 341 U.S. 58, 66; emphasis supplied.]

The Secretary's error subjected the cancellation proceedings, when brought, to dismissal for failure to state a cause of action. But such a failure in any lawsuit, judicial or administrative, is no ground to set the decision aside as void after it has become final. Cf. *Avco Corp.* v. *Aero Lodge 735,* 390 U.S. 557, 561; *Foltz* v. *St. Louis & S.F. Ry. Co.,* 60 Fed. 316, 318 (C.A. 8); Moore, *Federal Practice* ¶ 60.25[2] (2d ed. 1968).[4]

The same practical considerations of need for final-

[4] The courts below also relied to some extent on an alleged administrative interpretation of this Court's decision in *Virginia-Colorado* as rendering all prior cancellations void. As the Secretary pointed out in his decision, *infra* pp. 68a–72a, the evidence of this interpretation is fragmentary and inconclusive; the interpretation itself was erroneous; and, most important, "there is no clear showing that any of the appellants knew of or relied upon any of [the documents tending to show the practice, reproduced as appendices to the Secretary's opinion,] at the time they acquired an interest in their claims" (at 72a). Such evidence of the interpretation as there is is largely confined to the period immediately following this Court's decision in *Virginia-Colorado*, and is thus consistent with what would have been a quite appropriate undertaking to reopen any improperly cancelled claims as to which that was desired *at that time.* It hardly need bind the Secretary or this Court *now*, decades after the decision, when it has become amply clear that the original locators had no continuing interest in their claims.

ity in the administration of justice which limit the circumstances in which judicial actions will be found to have been void also apply in the administrative setting. If it is decided that courts have been applying an erroneous principle of law in a class of cases, it would nonetheless be chaotic to declare that all prior decisions based on that principle, however final, are thereby deprived of effect. Indeed, even in criminal cases involving ongoing deprivations of personal liberty and matters of constitutional principle, the need for finality often prevails in determining whether judgments based on erroneous principles shall be subject to collateral attack. *E.g., Tehan* v. *Shott,* 382 U.S. 406. When administrative agencies err in applying the governing law, their action is frequently characterized in such terms as "beyond the authority conferred by law," 295 U.S. at 647; if on each such occasion all prior, final decisions resting on the same error were thereby nullified, agencies would be subjected to a far heavier burden of litigation, and the certainty of their adjudications would be substantially compromised.

In the particular case of the Secretary of the Interior, that burden would be insupportable. He is entrusted with management of the entire public domain. This Court noted the magnitude of that operation in *Best* v. *Humboldt Mining Co., supra,* 371 U.S. 339 n. 8 and *Boesche* v. *Udall,* 373 U.S. 472, 484 n. 13: during fiscal 1961, 27,228 mining claim adjudications were closed, and at the outset of that year, 159,000 mineral leases covering 125,000,000 acres of public domain were outstanding, requiring his supervision under the Mineral Leasing Act. In view of these responsibilities, and

others like them, it is manifest that the Secretary must be able to rely on his records of action taken affecting the land under his control, where those actions are not directly challenged by the individuals concerned. If legal error in a determination serves to render all prior, similar determinations void, this certainty—always thought particularly essential in the context of transactions affecting land—will be unattainable.

It is clear, moreover, that the cancellations of the 1920's and 1930's—albeit erroneously based—served the basic public policy of clearing public lands of abandoned claims to facilitate their use in the public interest. In reliance on the cancellations, the Secretary moved to promote those uses. Under the Mineral Leasing Act, all the lands were reserved for disposition under a leasing system providing for rentals, royalties, and continuing supervision for the benefit of the public as a whole.[5] Indeed, oil and gas leases have been issued on 8,860 acres of the lands involved in this case, and applications for leases are pending on an additional 5,280 acres (R. 7945–7948). Other of these lands have been withdrawn by Presidential order and placed in national reserves under the administration of the Department of the Navy (R. 7683–7693). Patents have been issued on 1400 acres of these lands under nonmineral land laws since the alleged location of these claims (R. 7794–7839). Bureau of Mines facil-

[5] Under Executive Order No. 5327, all oil shale deposits were withdrawn from leasing April 15, 1930 and reserved for investigation, examination and classification. Oil and gas leases on these lands were authorized February 6, 1933 by Executive Order No. 6016, and all the leases described in the following text have been issued since that day.

ities have been constructed on part of the land here involved, in connection with the experimental oil shale operation at Rifle, Colorado (R. 8550). Almost all of the land is in use as grazing land under the Taylor Grazing Act, 43 U.S.C. 315, and fences, reservoirs, and other range improvements have been constructed to support these operations (R. 7948–8463). If the old cancelled claims must be recognized, as the courts below held, their present holders may be able to quality for patents. In that event, they would receive title to the land and be able completely to disrupt this program of use, which was undertaken in reliance on the virtual absence of challenge to the massive cancellations of the 1920's and 1930's.

It does not follow from the decisions below that respondents are entitled to patents, since the claims remain subject to challenge, *inter alia,* for lack of discovery and abandonment. If these issues must be resolved on a case-by-case basis, however, as they presumably would have to be if the prior cancellations cannot be relied upon, the Secretary will be faced with an intolerable burden. There are at least 30,000 claims, most of them involving eight locators when made fifty or more years ago. To clear the title to the oil shale lands would require at least a diligent search for all their successors-in-interest, a number that by now could reach into the millions. To the cost of this search must be added that of litigation. One recent test case on the issue of discovery involved 39 hearing days, a 5,248 page transcript and approximately 2,000 exhibits. Plainly the monetary and administrative costs of contesting the cancelled claims today would be staggering.

2. The Secretary's invocation of laches to bar the present claims, permissible only if the cancellations may be given continuing effect, adequately distinguishes the holding in *Virginia-Colorado*. As already noted, the facts in *Virginia-Colorado* showed only a fifteen month interruption in assessment work, and the very fact that the cancellation proceedings there were vigorously contested tended to show that those claimants, unlike most, desired to maintain their claims. Thus, the Court stressed, "There is no ground for a charge of abandonment. The allegations of the bill [that there had been only a fifteen-month interruption and that the claimants stood ready to resume work], admitted by the motion to dismiss, dispose of any such contention." 295 U.S. at 646. Only one of the claims involved in this case, on the other hand, was appealed even administratively; in none did claimants seek either judicial review or post-*Virginia-Colorado* vacation of the cancellation. The claims lay dormant for twenty years, when (with limited exceptions) they were purchased at low prices, other locators on them were eliminated by forfeiture, and the present proceedings were begun.[6] Unlike *Virginia-Colorado,* this

[6] For example, the claims involved in respondent Oil Shale Corporation's petition were obtained through one Tell Ertl. Ertl approached various of the original locators in the mid-1950's and paid them a few hundred dollars for their rights. He then allegedly performed assessment work on the claims and filed forfeiture proceedings against the remaining locators, who apparently had not known of or participated in this work, under 30 U.S.C. 28. For 16 of the 77 claims involved, Ertl received $1,536,000 from the Corporation; the remainder are leased to it with an option to purchase (App. 23a; *Hamilton* v. *Ertl*, 146 Colo. 80, 360 P. 2d 660).

history shows that here the Secretary's hypothesis, that the oil shale claims on which assessment work had lapsed had been abandoned, was in fact correct.

In similar circumstances, this Court long ago held that the doctrine of laches could be invoked to bar the claim. The case involved the sale by a war widow and her children of the warrant for a quarter-section of government land her husband had received for enlisting in the armed services. The sale was made without first obtaining a necessary order from the orphans' court, but at a fair price; subsequently, the land obtained with the warrant was swallowed up by the growth of a major city and its value multiplied several thousand times. The widow's heirs sought to assert the defect in title caused by the failure to obtain an order from the orphans' court. This Court held against them, stating:

> If the complainant may put forward these excuses for delay [ignorance of the defect and want of means to investigate it] after thirty years, there is no reason why they may not allege the same as an excuse after a lapse of sixty. The truth is, there must be some limit of time within which these excuses shall be available, or titles might forever be insecure. The interests of public order and tranquillity demand that parties shall acquaint themselves of their rights within a reasonable time, and although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable.

Wetzel v. *Minnesota Railway Company*, 169 U.S. 237, 241. See also *Brennan* v. *Udall*, 379 F. 2d 803 (C.A. 10),

certiorari denied, 389 U.S. 975. Because the Secretary's supervisory authority over the public domain continues until a patent is issued, he is not bound by *res judicata,* and could have set the early decisions aside and granted the patents, *West* v. *Standard Oil Co.,* 278 U.S. 200, as at first he did for the few who requested that action in the immediate wake of *Virginia-Colorado.* In this case he elected not to do so, on the grounds that these claimants had waited too long and showed no equitable or legal reason to excuse that delay (*infra,* pp. 59a–60a). This was neither arbitrary nor capricious. See *Gabbs Exploration Co.* v. *Udall,* 315 F. 2d 37, 40–41 (C.A. D.C.), certiorari denied, 375 U.S. 822. As we have noted above, it is essential that there be some stability to the status of the public domain and that such status be apparent to the Secretary from his records, so that he may classify and administer the lands entrusted to his care by Congress. The alternative, we submit, is to create an uncertainty which would defy the best-intentioned administrator of this vast national resource.

3. For the reasons stated above, we do not believe *Virginia-Colorado* must be given retrospective effect to nullify the thousands of unchallenged cancellations of claim appearing in the Secretary's records, and which had become final by the time of that decision. If that is the necessary import of the decision, however, we are prepared to argue that, at least to that extent, the case was wrongly decided. It rested on the premise that the United States was utterly without interest whether annual assessment work was performed on a claim or not—that is, that once a pros-

pector had staked out a claim, he had a possessory right good against the United States in perpetuity, unless the government was able to prove his intent to abandon it; he had no obligation to work the claim. It is difficult to believe that the Congress which passed the Mineral Leasing Act of 1920 to promote the more efficient use of national resources could have been so careless with resources against which there was already a claim.

Indeed, the cases relied upon by this Court in *Virginia-Colorado* for the proposition that the government lacked interest in the performance of assessment work were cases where the government lacked any interest *in fact, i.e.*, they were cases in which there was no competing government use proposed at the time of the controversy. There was a well-established and distinct line of cases, not brought to this Court's attention at the time, which held that where there *was* such a competing use for which the government wished to reserve the land, for example, a national park, the government like any private prospector could divest a claimant who had not performed the necessary assessment work. See, *e.g.*, *E. C. Kinney*, 44 L.D. 580, 582; *Interstate Oil Corp. et al.*, 50 L.D. 262; *Standard Shales Prod. Co.*, 52 I.D. 522; *Hodgson* v. *Midwest Oil Co.*, 17 F. 2d 71 (C.A. 8); Lindley, *Mines* (3d ed.) vol. 1, pp. 398–399. The Mineral Leasing Act itself created such a competing use in this case.

We recognize that the decision in *Viriginia-Colorado* was unanimous, and that the issue is a statutory one as to which reexamination would not often be under-

taken. Should the Court inescapably conclude, however, that the decision, if left standing, must be given retrospective effect, we believe the implications for the public domain would warrant its reconsideration.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1969.

Appendix A

United States Court of Appeals, Tenth Circuit

[Filed United States Court of Appeals, Tenth Circuit, Feb. 4, 1969, William L. Whittaker, Clerk]

No. 9581

Stewart L. Udall, Secretary of the Interior, appellant

v.

The Oil Shale Corporation, et al, appellees

No. 9582

Stewart L. Udall, Secretary of the Interior, appellant

v.

Joseph B. Umpleby, et al, appellees

No. 9583

Stewart L. Udall, Secretary of the Interior, appellant

v.

Barnette T. Napier, et al, appellees

No. 9584

Stewart L. Udall, Secretary of the Interior, appellant

v.

Penelope Chase Brown, et al, appellees

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January 1969 Term

No. 9581

DISTRICT COURT No. 8680 CIVIL

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

THE OIL SHALE CORPORATION, ET AL, APPELLEES

No. 9582

DISTRICT COURT No. 8685 CIVIL

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

JOSEPH B. UMPLEBY, ET AL, APPELLEES

No. 9583

DISTRICT COURT No. 8691 CIVIL

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

BARNETTE T. NAPIER, ET AL, APPELLEES

No. 9584

DISTRICT COURT NO. 9202 CIVIL

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

PENELOPE CHASE BROWN, ET AL, APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Edmund B. Clark, Attorney, Department of Justice, Washington, D.C. (*Harold S. Harrison,* Acting Assistant Attorney General, *Lawrence M. Henry,* United States Attorney, *Roger P. Marquis* and *Thos. L. McKevitt,* Attorneys, Department of Justice, with him on the Brief), for Appellant.

Fowler Hamilton, New York City, N.Y., for Appellees, The Oil Shale Corporation, et al, and *Penelope Chase Brown,* et al; *Fred M. Winner,* Denver, Colorado, for Appellees, *Joseph B. Umpleby,* et al; *Karl Ranous,* Denver, Colorado, for Appellees, *Barnette T. Napier,* et al (*Tweedy, Mosley & Young,* Denver, Colorado, and *Cleary, Gottlieb, Steen & Hamilton,* New York City, N.Y., with them on the Brief).

Before PHILLIPS, HILL and SETH, *Circuit Judges.*

SETH, *Circuit Judge.*

These are appeals in four consolidated cases wherein the United States District Court for the District of Colorado entered judgments for the plaintiffs.

These plaintiffs were asserting that the Secretary of the Interior had no authority to deny applications for patents for oil shale mining claims on the ground that assessment work had not been done, or on the ground that the claims had previously been cancelled by the Department for the same reason. The Secretary in Union Oil Company of California, 71 I.D. 169, and 72 I.D. 313, had taken the position that he could deny such applications under his construction of the opinions of the Supreme Court in two cases involving departmental cancellation of claims for failure to do assessment work. The issue on this appeal is whether the trial court was correct in holding that these two previous decisions were binding in the present case, and that they had held that the departmental adverse proceedings and the cancellation orders there litigated were void as were all others entered on the same ground.

In three of the cases the plaintiffs sought relief by mandamus, and in the fourth case a declaratory judgment was sought.

There follows a brief summary of the history of the four groups of claims in the consolidated cases:

The Oil Shale Corporation Claims (*Case No. 9581*):

> These claims were located in December 1919 and January 1920. Contest proceedings were started against these claims by the Land Office in 1927 as Nos. 11,757, 11,759, and 11,761, for failure to do assessment work. In 1928 the Commissioner entered a decision that the claims were void. The decision was entered upon the failure of the contestees to appear and to answer the departmental assertion that assessment work was not done for the years 1921-1927. All the claimants of this group of claims have not made application for patents and were not parties in Union Oil Company of California, 71 I.D. 169.

Umpleby Claims (Case No. 9582):

These oil shale claims were located in 1918, were contested by the Land Office in No. 12,029 in 1929, and declared to be invalid and cancelled for failure to perform annual assessment work. Recently the claimants made application for patents which were rejected by the Secretary in Union Oil Company of California, supra.

Napier Claims (Case No. 9583):

These claims were located in 1918, were contested by the Land Office in No. 12,972 in 1931, and declared to be invalid and cancelled for failure to do assessment work. Patent applications for these claims were rejected by the Secretary in Union Oil Company of Cali[illegible] supra.

Brown Claims or Oyler Claims (Case No. 9584):

These claims were located in 1916, and in 1929 contested by the Land Office in No. 12,039, and declared invalid and cancelled for failure to do assessment work. Patent applications were rejected by the Secretary in Union Oil Company of California, supra.

When these placer claims were located the federal mining laws provided that upon a discovery of valuable mineral deposits upon the public domain, a mining claim could be established simply by marking the location so that its boundaries could be easily followed. The mining districts and the states added some additional requirements, but it was not necessary to secure the consent of any federal officials nor to even advise them of the location. Thus the discoverer could himself take steps immediately to protect his find. This was, of course, a practical and effective method for the prospector and miner, and it served to develop the mineral resources as was intended by Congress.

The markings at the location and state required notices served to advise other miners of the claim when they would go on the same ground. After the location was made it was required that the claimant perform a certain amount of work each year to demonstrate that he was holding it in good faith and to further advise others interested in the same ground that the claim was being asserted. Chambers v. Harrington, 111 U.S. 350. This assessment work was a requirement in virtually all of the mining districts by rule before the first federal statute on the subject was enacted. O'Reilly v. Campbell, 116 U.S. 418. Under the rules and the statute, if the work was not performed as and when required, the ground was then open to location by another person as if no prior claim had been staked. However, if no stranger so relocated the ground, the initial claimant could, after any failure to perform the work, resume assessment work and thereby the claim would not be subject to location by others. Belk v. Meagher, 104 U.S. 279. The assessment work year has been changed by Congress from time to time, and it has also provided moratoria for assessment work.

The basic federal requirements, the staking, and the assessment work were all acts relating to the ground itself and to create some condition which could be observed by persons seeking to locate claims in the same area. It was an inter-miner-prospector matter, and the federal government was not initially involved. The claims could, of course, be held indefinitely against others, and the Government, and be mined without doing more than making a valid location and performing the required assessment work. Upon the valid location, a possessory title passed from the United States to the locator which was a property right universally recognized. A patent could there-

after be sought by making application to the Land Office, but this was not a required step. The states in various ways supplemented the methods of marking and added a variety of notice, recording or filing requirements.

As to the assessment work aspect of claims made at the times these in question were made, it is apparent that the issue as to whether the work had been performed was a matter between rival claimants. It was precipitated by an overstaking and the resultant dispute as to whether the ground was then open for location. The issue was decided by the courts between the individuals concerned. 17 Stat. 93; see the older Departmental Regulations, 37 L.D. 757 (1909). Cameron v. United States, 252 U.S. 450. The current Regulations also expressly so provide. 43 C.F.R. § 3420.4.

It is important to consider the claims in question and the assessment work problems in this context of practice, district rules, and statutes alluded to above. The Federal Mining Leasing Act of 1920 (30 U.S.C. § 193, 41 Stat. 451) removed a few minerals including oil shale from the traditional method of location, and it must also be examined in this setting. As to those minerals not included in the Act, the traditional method generally prevails today. See Brennan v. Udall, 379 F. 2d 803 (10th Cir.).

When the Mineral Leasing Act became effective, no new mining locations could be made for oil shale as there was substituted a leasing method. Thus those locators who already had made valid locations before the Act were not thereafter faced with the possibility of other locators overstaking their claims for oil shale if assessment work was not performed. Thus, the assessment work requirement on pre-Mineral Leasing Act oil shale claims could not be "enforced" or tested by the acts of a second oil shale locator versus a prior

locator. The pre-Act claims were thus placed in a unique position.

The General Land Office soon after the passage of the Mineral Leasing Act undertook an ambitious program to eliminate the pre-Mineral Leasing Act oil shale claims upon which assessment work had not been done. This program included the claims here in issue, and they were all cancelled by departmental action following contest proceedings directed against them for a failure to do assessment work. The program led to litigation to test the authority of the Department to cancel claims for such a reason. This culminated in Wilbur v. Krushnic, 280 U.S. 306, decided by the Supreme Court in 1930, and in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, in 1935. The claims in issue were cancelled before the decision in Virginia-Colorado.

It would not seem necessary to analyze at any length the two cases—Krushnic and Virginia-Colorado. They are treated by the trial court in its opinion at 261 F. Supp. 954, at 966, and in the literature on the subject of assessment work. 2 American Law of Mining, Title VII, § 7.1. It is sufficient to say that these cases held that the doctrine outlined above relative to assessment work and who could challenge locations for failure to do such work was not changed by the Mineral Leasing Act. The Court clearly held that the Department (Secretary) had no power or authority to cancel claims solely on the ground that the assessment work had not been done.

At the time of the Supreme Court decisions cited above, the administrative cancellation proceedings in the Land Office had, of course, progressed to various stages in different proceedings. Thus some proceedings had concluded and orders had been entered cancelling the claims, while in others the proceedings

were still in progress. But, as indicated above, cancellation orders had been entered in the contest proceedings directed against the claims here in issue. In 1935, following the Virginia-Colorado opinion, the Secretary in his decision, The Shale Oil Company, at 55 I.D. 287, stated that the adverse proceedings and the decision of the Commissioner cancelling certain oil shale claims in the case before him for failure to perform assessment work were void. The decision for the Secretary said of the Virginia-Colorado case:

> "In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein in the instant case must be held as without authority of law and void. The above-mentioned decision of the Department in the *Virginia-Colorado Development Corporation* case and the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of *Francis D. Weaver* and *Federal Oil Shale Company* and other Departmental decisions in conflict with this decision are hereby overruled. The Commissioner's decision is reversed and the record in the case remanded with instructions to reinstate the application and entry *in toto* and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clearlist the application for patent."

The Department for many years thereafter, as demonstrated by the record in these cases, adopted a policy that its prior cancellations and proceedings taken to cancel oil shale claims for failure to perform assessment work were invalid or were void. The expression of this policy continued until about the time of the decision in Union Oil of California, 71 I.D. 169, and 73 I.D. 313, which gave rise to this litigation.

It is well at this point to refer to the somewhat

older (1920) case of Cameron v. United States, 252 U.S. 450. There the Supreme Court upheld the right of the Land Office to challenge mining claims on the ground that a discovery had in fact not been made. The fact of discovery was and is the basic statutory fact required to support any mining claim. It has been referred to as the source of title and what segregates the claimed ground from the public domain. It must have taken place before any title passes from the Government to the claimant. The Court held in Cameron that the Land Office could challenge the mining claims there concerned as to this fact of discovery, but this was the extent of the decision. The claims there sought to be established were so located as to cover the Bright Angel Trail leading into the Grand Canyon. The issue was discovery and not assessment work. Also in Best v. Humboldt Mining Co., 371 U.S. 334, the Court had before it in general terms a case similar to Cameron, supra, and expressed no new concepts in the authority of the Secretary. See also United States v. Coleman, 390 U.S. 599.

The Government on this appeal would present the issue very broadly, as being the authority of the Secretary of the Interior as to entries and locations on the public land. If the question is so broadly stated there can be found any number of decisions where reference is made to the wide extent of his duties as to the public domain. See Boesche v. Udall, 373 U.S. 472. However the issue cannot here be put in such broad terms. Instead the issue must be limited to the effect of the Krushnic and Virginia-Colorado cases upon the prior departmental cancellations of claims for failure to do assessment work. There are some variations on this question and some related problems, but it is the basic issue.

It must be recognized that the departmental decision in Union Oil Company of California, supra, represents a reversal of the expressed policy of the Department which had prevailed since the Virginia-Colorado decision and The Shale Oil Company case, 55 I.D. 287, both in 1935. The record shows that this policy was expressed in correspondence, public statements, annual reports, and in official action. This official action includes the patenting of a substantial number of oil shale claims during this interval which had been previously cancelled by the Department for failure to do assessment work. This reversal of policy also represents a determination by the Secretary to have the Krushnic and Virginia-Colorado cases revisited. The Government in its brief states that the subject matter of this litigation is the same that was before the Secretary thirty-five years ago in proceedings leading to the Krushnic and Virginia-Colorado cases.

It is apparent that the private "enforcement" of the assessment work requirement through the overstaking by others of the ground covered by prior claims on which the work had not been done was completely thwarted by the intervention of the Mineral Leasing Act as to competing locations for oil shale. The old claims were thus sheltered by the Act. However the ground could have been relocated by others for non-Mineral Leasing Act minerals had they been discovered (ignoring withdrawal problems). With the removal of relocation as the method to make the nonworked locations available, the Department undertook its campaign to cancel which was halted by the Krushnic and Virginia-Colorado cases, and has here again resumed its efforts. The Secretary in the Virginia-Colorado case argued the effect of the Act described above. The Government in its

reply brief in the appeal before us states that the decision in Virginia-Colorado is "wrong" but suggests that since we are bound by it, "it should be confined to its exact facts. . . ."

We find no change in the authority of the Secretary since the Supreme Court decisions referred to above. There has been some relatively minor statutory change but it does not affect this issue. The Supreme Court held in Virginia-Colorado that the Secretary was acting outside his statutory authority when he cancelled the claims for the reason he did. The Court said: "We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law." It was a clear and direct holding, and it followed the Khrushnic decison and, of equal importance, it followed Cameron v. United States, 252 U.S. 450. The decision must be taken by us to hold that the Secretary was without power or authority under the laws to bring the adverse proceedings on the ground it did, and to so cancel the claims. This in the administrative area must be taken to mean his actions were void and of no legal effect. They were beyond his authority conferred by law, and this is the sole source of his power. Pan American Petroleum Corp. v. Pierson, 284 F. 2d 649 (10th Cir.). The Secretary so understood as indicated in the departmental decision in The Shale Oil Co., 55 I.D. 287, and by his later patenting of other cancelled claims. If his acts are so treated, the cancellations of the claims here concerned were of no effect and they stand as if no departmental action to cancel had been taken. Gabbs Exploration Co. v. Udall, 315 F. 2d 37 (D.C. Cir.), may have arrived at a somewhat different conclusion, but it relied upon an abandonment assertion. It does not make much difference how this absence of administra-

tive power is characterized, whether it is called lack of jurisdiction as the term is used with reference to the courts, or whether it is a lack of statutory power or authority, or lack of a duty covering the particular action attempted.

In West v. Standard Oil Co., 278 U.S. 200, the Court had before it an action against the Secretary of the Interior to enjoin proceedings in a local land office ordered by him to determine whether certain lands were known to be mineral at a certain time, and thus to attempt to determine whether title passed to the State under the Act of March 3, 1853. The Court found that the Secretary had no "affirmative duty" to the state or to a claimant. The Court said that Congress did give the Secretary the "power" to pass generally on the right of the state to the land. The Court said:

> "The broad power of control and supervision conferred upon the Secretary 'does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act.' Payne v. Central Pacific Railway Co., 255 U.S. 228, 236."

The Court concluded that the prior Secretary had acted without authority, and in substance that his order was of no effect. The Court placed the determination of power on the finding of a "duty." Under the circumstances before us the Court had also found no duty within the statutes. It is reasonable to conclude from the West opinion that the action of the Secretary there was void as it was here.

Thus we must hold, as did the trial court, that under the prevailing decisional and statutory law, the initial administrative proceedings as such and also the cancellation of the claims here in issue were of no effect. The Supreme Court decisions were

handed down some thirty years ago and Congress has not extended the power of the Secretary as to this particular matter as well it could because it has been seriously concerned with oil shale development. In any event, if it was then deficient the acts then taken were void. As to whether the Secretary can now refuse to patent by reason of gaps in annual assessment work we feel bound by the Supreme Court's decisions and by the absence of Congressional action. The Secretary must follow those decisions on this point.

The Government here argues in effect that the Secretary has all the powers mentioned in the Constitution relating to public lands, but this cannot be. These powers are not in the Secretary, but are vested in Congress and he has what the statutes provide that he have and no more.

It must be borne in mind that these proceedings, derived as they are in part from the Union Oil of California case, are concerned only with the annual assessment work problem, and not with the many other hurdles which must be crossed by a claimant on the way to patent.

The Supreme Court cases removed the issue with which we are here concerned from the administrative arena and decided, and said expressly, that the basic power and authority of the Secretary was lacking as to his cancellations; and equally important was lacking as to his challenge to the claims and his adverse proceedings for the purpose sought. When such fundamental propositions were decided it made no difference to what extent the administrative action in the decided case had progressed or in any other like contest already disposed of. It further could make no difference whether the claimants took any further administrative action or not because what had gone

before was void. The Secretary would here place the parties back in the various stages of the administrative proceedings where they were when the Department was stopped by the Virginia-Colorado case, and then start the machinery again and apply the doctrines of exhaustion of administrative remedies, etc. But, as stated above, the Supreme Court did more than interrupt the proceedings; it completely invalidated them as if no contests had commenced.

The Department proceeded initially on the proper course following the decisions as is shown in the record on this appeal. In many subsequent proceedings concerning other claims cancelled as these before us were, it ignored its prior administrative action; and it received applications to patent such claims, and patents were issued.

The land status in the area concerned has become somewhat complicated in that surface entries were received and processed; the Taylor Grazing Act has been administered in the same area as these and other claims of similar status; oil and gas leases have issued, and other entries have been processed by the Department. The Secretary advances this problem as an argument to support its refusal to patent, but these complications are not essentially different than in any area where there are a considerable number of unpatented mining claims. This is one of the Secretary's basic problems in administering lands where the general mining laws are applicable, and all the data as to the locations and claims may not be in the records of the Land Office. This involved land status is not the doing of the mining claimants, as the Department has proceeded to receive these other entries and to process them regardless of the unpatented claims. It is not a question of laches on either side. Time and the pressure for land utilization have com-

plicated the land use on the one hand and have added administrative problems on the other. The Secretary is certainly equal to solving these problems as they are everywhere present.

These cases on appeal are like a voice out of the past with mining locations dating from 1918, with the clearly established legal propositions directly applicable to them and the matter thought to be at rest, but here we are some thirty or thirty-five years later and having progressed, or at least moved, somewhat out of the pick and shovel era faced with the same issues as to the same claims. It is, as stated above, the Virginia-Colorado issues and era revisited.

The appellees urge that we consider a contention presented to the trial court that the Department cannot retroactively change a "rule." However it appears that the problem is a more fundamental one than rule making, and is instead a reluctance by the Secretary to continue to follow the Supreme Court's decisions as his predecessors have before, and to seek a new interpretation or to ultimately have the Court modify them. This issue we have considered above and we need not treat this as a separate matter.

The Government urges that the same issues are present in all four cases. The relief sought is basically in the nature of mandamus and directed to the Secretary's action in the Union Oil case. 28 U.S.C. § 1361 gives the District Court jurisdiction in these proceedings. The Act of 1962 subjected the officers and employees of the Government to such actions in all the United States District Courts. The nature of these actions was defined by this court in Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F. 2d 364 (10th Cir.). See also Smith v. United States, 333 F. 2d 70 (10th Cir.); Motah v. United States, 402 F. 2d 1 (10th Cir.); Pan American Petroleum Corp. v.

Pierson, 284 F. 2d 649 (10th Cir.); Couch v. Udall, No. 9834, December 4, 1968, —— F. 2d —— (10th Cir.). As the legislative history indicates the intent was only to broaden the venue provisions of the prior Act. U.S. Code Cong. & Ad. News, 87th Cong., 2d Sess., page 2785.

For the reasons indicated above we must hold that the Krushnic and Virginia-Colorado decisions of the Supreme Court control. These decisions must also be taken to mean that the prior cancellations for failure to do assessment work were void and are still void. Thus the Secretary was again without authority to attempt to base his actions on the same ground.

Affirmed.

APPENDIX B

No. 9581

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

THE OIL SHALE CORPORATION AND ENERGY RESOURCES TECHNOLOGY LAND, INCORPORATED, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Before Honorable ORIE L. PHILLIPS, Honorable DELMAS C. HILL and Honorable OLIVER SETH, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER,
Clerk.

By GLADYS E. HOBBS,
Deputy Clerk.

APPENDIX C

UNITED STATES DISTRICT COURT, D. COLORADO

CIV. A. Nos. 8680, 8685, 8691, 9202

THE OIL SHALE CORPORATION AND ENERGY RESOURCES TECHNOLOGY LAND, INCORPORATED, PLAINTIFFS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DEFENDANT

JOSEPH B. UMPLEBY AND WASATCH DEVELOPMENT CO., PLAINTIFFS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DEFENDANT

BARNETTE T. NAPIER, GRACE A. SAVAGE, JOAN L. SAVAGE, MAUDE B. FARNUM, ST. CLAIR NAPIER CATLIN, WILLIAM H. FARNUM, JR., JOHN R. FARNUM, JOHN W. SAVAGE, AND NEIL S. MINCER, PLAINTIFFS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DEFENDANT

PENELOPE CHASE BROWN, INDIVIDUALLY AND AS TRUSTEE, AND THE OIL SHALE CORPORATION, PLAINTIFFS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DEFENDANT

December 21, 1966

Memorandum opinion and order

WILLIAM E. DOYLE, *District Judge:* The four above-named actions arise under the Constitution and laws

of the United States. Plaintiffs in all four actions seek an adjudication that certain decisions of the Department of the Interior, hereinafter the Department, regarding oil shale placer mining claims in Colorado are erroneous, invalid and without force and effect. Plaintiffs in Civil Action Nos. 8685, 8691 and 9202 seek mandatory orders to compel the Department to issue patents on several placer claims pursuant to certain applications filed by plaintiffs. Plaintiffs in Civil Action No. 8680 have not filed a patent application, but seek a declaratory judgment regarding their alleged rights to gain patents from the Department on several of the Colorado oil shale mining claims. The trial was to the Court. Extensive trial and post-trial briefs have been filed, voluminous exhibits have been received in evidence, and oral arguments have been presented. The case now stands submitted.

There are few factual disputes. Most of the controversy concerns the policies of the Department and certain Supreme Court decisions relating to extensive oil shale reserves in Colorado, Utah and Wyoming. For the sake of clarity, the position of the plaintiffs in each of the consolidated cases will be summarized at the outset. The specific facts surrounding the claims in the several actions are related so as to clarify the issues and furnish basis for the decisions.

Civil Action No. 8680

Plaintiffs, The Oil Shale Corporation and Energy Resources Technology Corporation, Inc. are, respectively, Nevada and Colorado corporations. Energy Resources allegedly owns certain oil shale mining claims, referred to as the Group A Bute Claims (officially entitled Bute Placer Mining Claims Nos. 1–19, inclusive, 21–28 inclusive, and 30–32 inclusive). The Oil Shale Corporation allegedly owns the Group B

Bute Claims (officially entitled Bute Placer Mining Claims Nos. 33–48, inclusive), the Camp Bird Claims (officially entitled Camp Bird Placer Mining Claims Nos. 1–20, inclusive) and the Atlas Claims (officially, the Atlas Placer Mining Claims Nos. 1, 2, 3, 7, 9, 10, 12, 17, 18). All of these claims are located in Rio Blanco County, Colorado; all allegedly contain valuable oil deposits.

Plaintiffs trace their interests in these claims through one Tell Ertl who, during the 1950's, acquired them from the original claimants and their successors in interest by purchase and forfeiture proceedings under Title 30 U.S.C. § 28. Hamilton v. Ertl, 146 Colo. 80, 360 P.2d 660 (1961). All of the claims were allegedly located by the original claimants during December, 1919 and January, 1920. Thus they predate enactment of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, Title 30 U.S.C. § 181 et seq. This act changed the mining law policy in that certain mineral lands were withdrawn from location.

In 1927, the Department instituted certain contest proceedings, Contest Nos. 11,757, 11,759 and 11,761 against the original claimants regarding the above mining claims. On May 4, 1928, the Commissioner, General Land Office, issued letter decisions declaring the claims null and void for the failure of the named contestees to appear upon notice and process purportedly served and answer charges alleging their failure to perform annual assessment work for the years ending July 1, 1921 to 1927, inclusive, as required by 30 U.S.C. § 28.

Plaintiffs contend that the Supreme Court has, on two occasions, held that the Department lacked authority to declare mining claims null and void for failure to perform annual assessment work. Wilbur

v. United States ex rel. Krushnic, 280 U.S. 306, 50 S. Ct. 103, 74 L. Ed. 445 (1930); Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639, 55 S. Ct. 888, 79 L. Ed. 1627 (1935). Their further contention is that in any event the contestees were not given proper notice of the contest proceedings. They allege that following the Supreme Court's decisions in Wilbur v. United States ex rel. Krushnic, supra, and Ickes v. Virginia-Colorado Development Corporation, supra, the defendant's predecessors in office and various officials and employees of the Department repeatedly and publicly affirmed that the decisions in the assessment work contest proceedings, including Contests Nos. 11,757, 11,759 and 11,761, were null and void; that from 1935 until 1962, the defendant and his predecessors in office issued land patents covering at least 74,000 acres of oil shale claims which had been declared null and void in assessment work proceedings such as those here involved, and which were in all respects of fact and law the same as the mining claims referred to above in which plaintiffs allege to have an interest. Plaintiffs argue that by reason of these acts the Department has adopted a rule of law, which cannot be retroactively altered, that the assessment work contests had no effect on the validity of mining claims. It is further alleged that the plaintiffs and their predecessors in interest have relied upon the rule of law purportedly adopted by the Department.

In 1962, plaintiff Energy Resources and others applied for patents on certain mining claims which had been the subject of departmental contest proceedings during 1930–1933 involving issues identical to those raised in Contest Nos. 11,757, 11,759, and 11,761. On February 16, 1962, the Manager of the Colorado Land Office, Bureau of Land Management, issued an opinion

rejecting the applications on the ground that while the original cancellations may have been erroneous as a matter of law at the time they were made, the principles of finality of administrative action, estoppel by adjudication, and *res judicata* prevent their now being challenged and consequently bar the patenting of such claims. The Manager's decision was affirmed by the Solicitor of the Department on April 17, 1964. Union Oil Company of California, et al., 71 I.D. 169 (1964). The plaintiffs assert that they have exhausted their administrative remedies and that the case is now ready for judicial review. They seek a mandatory injunction compelling the Department to expunge from Department records any decisions, orders, judgments or cancellations entered with respect to the mining claims of plaintiffs in Contests Nos. 11,757, 11,759 and 11,761. They also seek a declaratory judgment declaring such contest proceedings to be of no effect, and an injunction barring the Department from relying upon them to bar their patent applications, and any further relief appropriate.

CIVIL ACTION No. 8685

Plaintiffs Umpleby, a Texas citizen, and Wasatch Development Company, a Colorado corporation, seek similar relief in regard to certain mining claims in Garfield County, Colorado, known as the Carbon and Elizabeth claims. Plaintiff Umpleby is a successor in interest from the original claimants and the alleged owner of an undivided thirteen and one-half per cent interest in the unpatented Carbon Nos. 1 through 6 and Elizabeth Nos. 1 through 12 oil shale placer mining claims. Plaintiff Wasatch Development Company is a successor in interest from the original claimants and the alleged owner of an undivided eighty-six and one-half per cent interest in these claims. The claims were

allegedly located in 1918, prior to the enactment of the Mineral Leasing Act.

These claims were also the subject of a contest proceeding, Contest No. 12029, initiated by the Department against Umpleby and others in 1929, in which they were declared invalid for failure to perform annual assessment work. On September 8, 1959, plaintiffs filed application for mineral patent (Colo. 030979) on the Carbon Nos. 1 through 4 and Elizabeth Nos. 1, 2, 4 through 12 claims. In Union Oil Company of California, et al., supra, the Land Office Manager's rejection of this patent application was affirmed by the Solicitor. Plaintiffs make assertions similar to those made by plaintiffs in Civil Action No. 8680. They seek a declaration that the *Union Oil Company* decision is void because of the Supreme Court's decisions in Wilbur v. United States ex rel. Krushnic, supra, and Ickes v. Virginia-Colorado Development Corporation, supra, and the Department's subsequent affirmance thereof, and pray for a mandatory injunction compelling the Department to take such action as is necessary to issue patents to them.

CIVIL ACTION No. 8691

In this action, plaintiffs Napier and Grace Savage are California citizens, and plaintiffs Joan Savage, M. B. Farnum, Catlin, W. H. Farnum, J. R. Farnum, John Savage and Mincer are Colorado citizens. Plaintiffs are successors in interest and the alleged owners of three oil shale placer mining claims in Garfield County, Colorado, known as the Northwest, Northeast and Southeast claims. These claims were allegedly located by plaintiffs' predecessors in 1918, prior to the enactment of the Mineral Leasing Act. They also were the subject of a contest proceeding, Contest No. 12972, initiated by the Department in 1931, wherein the

claims were declared invalid for failure to perform annual assessment work. On June 1, 1959, the plaintiffs applied for a patent on the claims involved here. This application was also rejected by the Manager of the Colorado Land Office and affirmed by the Solicitor, Union Oil Company of California, et al., supra. Plaintiffs also contend that this decision is contrary to law and the settled practice of the Department. They seek a mandatory injunction compelling the Department to take such action as is necessary to issue the patents applied for, and a judgment declaring the departmental decisions adversely affecting their claims to be null and void, and other appropriate relief.

CIVIL ACTION No. 9202

Plaintiff Brown is a Colorado citizen, and is the successor in interest and the alleged owner of certain oil shale placer mining claims in Garfield County, Colorado, known as the Oyler claims (officially the Oyler Oil Shale Placer Mining Claims Nos. 1–4). Plaintiff The Oil Shale Corporation is a Nevada corporation holding a lease and option to purchase the Oyler claims. The Oyler claims were allegedly located in 1916, prior to the enactment of the Mineral Leasing Act. They too were the subject of departmental investigations and contest proceedings prior to the Supreme Court's decision in Ickes v. Virginia-Colorado Development Corporation, supra. The Department concluded from an investigation in 1918 that the claims had been properly located. A second investigation in 1920 affirmed the continued validity of the claims. In 1929, a contest proceeding, Contest No. 12039, similar to those discussed above, resulted in a declaration invalidating the claims for failure to perform annual

assessment work. In 1948, the sole surviving directors of the then record title holder of the claims, the Index Shale Oil Company, a dissolved corporation, conveyed the claims to plaintiff Brown and her husband. In 1955, the Browns conveyed the claims to the Pacific Oil Company, which filed a patent application in September of the same year, Colorado No. 012327. This application was also rejected by the Manager of the Colorado Land Office on February 16, 1962, and affirmed by the Solicitor in Union Oil Company of California, et al., supra. Apparently as a result of the Land Office Manager's decision in 1962, the Pacific Oil Company reconveyed the claims to plaintiff Brown. The lease-option agreement with plaintiff The Oil Shale Corporation was executed thereafter. Plaintiffs here make the same assertions and seek similar relief to that asked by plaintiffs in Civil Action No. 8680.

In summary, the plaintiffs assert at least three separate and independent reasons for according the relief sought in these consolidated actions:

1. The 1928–1933 contest proceedings of the Department are void for lack of jurisdiction and can give no basis for the *Union Oil* decision on any theory.

2. In 1935, the Department adopted a rule that the 1928–1933 contest decisions would be regarded as void and without force and effect and this rule cannot be reversed retroactively.

3. Even if the 1928–1933 decisions are regarded as merely erroneous, but supported by subject matter jurisdiction, the plaintiffs in the circumstances above described can now seek direct review and obtain their reversal.

THE ASSESSMENT WORK ISSUE: DEPARTMENTAL VIEW PRIOR TO THE KRUSHNIC AND VIRGINIA-COLORADO DECISIONS

The Department's broad power over the public lands gives it an undisputed jurisdiction over most aspects relating to the validity of mining claims, e.g., marking of claims, discovery, mineral character of the land, particularly when a patent application has been filed. Cameron v. United States, 252 U.S. 450, 40 S. Ct. 410, 64 L. Ed. 659 (1920); Best v. Humboldt Placer Mining Company, 371 U.S. 334, 83 S. Ct. 379, 9 L. Ed. 2d 350 (1963). In view of the scope of its acknowledged powers, the Department has, in recent decades, been reluctant to accept the proposition that it lacks power to question the sufficiency of assessment work performance in order to take possession of claims for the Government where such work is in default.[1] Under the mining laws, the penalty for failure to do assessment work traditionally has been that other *private* parties are empowered to enter onto the lands and relocate the claim. E.g., Belk v. Meagher, 104 U.S. 279, 26 L. Ed. 735, 736 (1881); Swan-

[1] That a distinction has been made between the Department's power to invalidate claims for non-performance of assessment work and its power to do so for other defects is illustrated by the following extract from The Federal Shale Oil Company, 53 I.D. 213, 216 (1930):

"Putting aside for the moment the question, whether departmental authority exists to attack mining claims for failure to do annual work, it can not be disputed that such authority exists to determine whether a valid claim was initiated prior to the date of the act by doing the acts the mining law prescribed, such as marking the boundaries so that they might be readily traced, making a discovery of mineral prior to the act, or thereafter as a result of work diligently in prosecution at its date."

son v. Sears, 224 U.S. 180, 32 S. Ct. 455, 56 L. Ed. 721 (1912); Knight v. Flat Top Mining Co., 6 Utah 2d 51, 305 P. 2d 503 (1957). Where there are co-owners to a mining claim, one co-owner can, by performing assessment work where the others do not, obtain complete ownership of the claim through forfeiture proceedings under 30 U.S.C.A. § 28. Hamilton v. Ertl, supra. In recent years, the Department has asserted its thesis that relocation for assessment work default is also a remedy available to the Government, and within its jurisdiction. But this has not always been its position.

In an early decision, P. Wolenberg, et al., 29 L.D. 302 (1899), the Secretary of the Interior recognized that the Department had no jurisdiction under the pre-Mineral Leasing Act mining laws to inquire into a charge of failure to perform assessment work. The Secretary reviewed the action of the Land Office Commissioner in ordering a hearing to determine whether annual assessment work had been performed on a contested claim. In vacating the order for a hearing on this question the Secretary made the following comments:

> "Ordinarily an order of your office directing a hearing, being an interlocutory proceeding, will not be disturbed upon appeal. Indeed, generally speaking, such an order is not appealable. This rule, however, is not without exception, and where it is made to appear that the order involves matters which the land department can not *inquire into* * * * the same may be considered and corrected or wholly vacated when brought to the attention of the Department, whether by direct appeal or otherwise.
>
> "In the present case the order for a hearing, in so far as it directs an *inquiry* into the charge of failure to make an expenditure of one hundred dollars, in labor or improvements, on the

Mascot claim during the year 1896, and the alleged relocation of the claim by reason thereof, clearly relates to matters over which the land department is *without authority*. The annual expenditure of one hundred dollars, in labor or improvements, required by section 2324 of the Revised Statutes, is solely a matter between rival and adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts, and not to the land department. In this respect the requirement made by section 2324 is essentially different from that made by section 2325, which makes the expenditure of five hundred dollars, in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the Government, the determination of which is committed to the land department. * * *

"The action of your office in *ordering a hearing* to determine whether the annual assessment work for 1896 had been done upon the Mascot, and, if not, whether work upon that claim had been resumed before the alleged relocation thereof, was erroneous." 29 L.D. at 303–04.

See also Barklage et al. v. Russell, 29 L.D. 401 (1900); Nielson v. Champagne Mining & Milling Co., 29 L.D. 491 (1900); Cain et al. v. Addenda Mining Co. (On Review), 29 L.D. 62 (1899).

Following these early decisions the Department took a different view in cases involving the right of mining claimants to lands subsequently withdrawn or reserved from mining locations. Thus, in Navajo Indian Reservation, 30 L.D. 515 (1901), the Department held that a valid mining location subsisting at the time of the reservation of lands as an Indian Reservation was excepted from the effect of the withdrawal and that such claim was subject to relocation upon failure of the original claimant to perform

annual assessment work. The Secretary refused to determine whether the original locators had defaulted, and whether the alleged relocators had succeeded to their rights, holding this to be a matter for the courts. However, he did consider the effect of the withdrawal upon the subsequent default of prior claims. Depending upon how the reservation was worded, the Secretary concluded, it might attach upon default of an existing claim so as to prevent relocation or it might never attach, regardless of the subsequent default. If, for example, the reservation did not flatly *exclude* the prior claims, but merely exempted them for so long as they are properly "maintained," a default in such "maintenance" would bring the land under the withdrawal and hence under the control of the Government.

The effect of a withdrawal under the reclamation act for irrigation works, 32 Stat. 388, was considered in a Departmental Instruction dated January 13, 1904, 32 L.D. 387. The Secretary noted that an unperfected mining claim is merely a possessory right which is liable to be divested for failure to maintain the claim in accordance with the mining laws and local regulations applicable thereto. He then stated that the land department has jurisdiction to determine whether the claimant has defaulted and to declare by its judgment whether such right has been divested so as to restore the land to the control of the Government. A decade later, in E. C. Kinney, 44 L.D. 580 (1916), this principle was followed to support the asserted jurisdiction of the Department to determine whether placer mining claims on withdrawn lands were subsequently defaulted for failure to perform annual assessment work. In referring to the January 13, 1904, Instruction, the Assistant Secretary said:

> "This is undoubtedly the true rule, for where a claimant is in default so that his claim could be defeated by another individual adverse claimant, surely the Government, desiring to devote the land to an important public use, may likewise take advantage of the default and divest the claim so as to free the land for Government use." 44 L.D. at 582.

As has been mentioned, the Mineral Leasing Act of 1920 instituted a new policy with respect to certain minerals, including oil shale, by withdrawing them from location and patent. After its enactment, many prior locators ceased doing annual assessment work on claims for minerals included under the Act on the ground that if such claims could no longer be located, neither could they be *re*located. An investigation by the Department after the enactment of the Leasing Act showed that work had stopped on many claims. Many contests were initiated alleging that failure to perform the work resulted in forfeiture of the claims to the United States. In bringing these contest proceedings the Department took the position that its jurisdiction to inquire into the validity of mining claims was enhanced by the new policy propounded by the Act. The Department reasoned that the provision of Section 37 of the Act, excepting from its coverage valid existing claims thereafter "maintained in compliance with the laws under which initiated," impliedly gave the Secretary the authority to determine what lands are subject to lease and what lands are within the exception of valid claims. In the Department's view, maintenance "in compliance with the laws under which initiated" included the performance of annual assessment work; hence, the Secretary's implied authority to determine what claims fell within the exception necessarily gave him jurisdiction to invalidate claims for nonperformance of such work.

The leading Department case enunciating this viewpoint was Emil L. Krushnic, 52 L.D. 295 (1929). There, the petitioner's application in 1922 for patent to certain oil shale placer claims was denied for failure to perform assessment work during 1920, although he had resumed such work in 1921 and 1922. The Commissioner ruled that to maintain a claim "in compliance with the laws under which initiated means, among other things, the performance of $100 worth of annual labor and improvement prescribed by section 2324, Revised Statutes * * *," and that failure to fulfill this requirement *automatically* terminated the claim and rendered it subject to disposition only under the Leasing Act. In affirming the Commissioner the Secretary emphasized the automatic nature of the termination upon default in performing the yearly labor.

> "Section 37 [of the Leasing Act] at one blow destroyed the right of relocation of such minerals and with it fell the right of resumption. * * * The fair and obvious meaning of section 37 is that if the annual work is not done, all the rights of the claimant *are* gone."
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> * * * * * * *
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> "The contention that the Federal Government must act the part of an adverse claimant in this and similar cases and be alert and vigilant and take some affirmative action to terminate the rights of a defaulting claimant before he resumes work, such as by physical reentry, or institution of adverse proceedings in the department or by bringing an ouster suit in the courts, is untenable." 52 L.D. at 297, 301–03.

Since he viewed the forfeiture to be automatic, immediately vesting the Government with complete con-

trol and ownership of the land, the Secretary was able to distinguish between the Department's jurisdiction under the general mining laws to settle disputes over assessment work performance between private adverse claimants and its jurisdiction under the Leasing Act to invalidate claims on its own initiative for failure to perform the annual labor.

> "The situation here is entirely different. The leasing act, as stated, repealed as to shale deposits the general provisions of the mining law and withdrew them from location and disposition thereunder and was a legislative assertion of control and ownership thereof by the United States, except as specifically provided in section 37 of the act. It is the duty of the department to scrutinize claims that are asserted to be within the exceptions and ascertain whether the government or the individual has the better right. The question is one of validity, and under section 37 maintenance is an essential element of validity. Only controversies between adverse claimants under conflicting mining locations of the same land, and which relate solely to the right of possession are committed exclusively to the courts. * * *" 52 L.D. at 303.

Following this ruling in *Krushnic* the land office instituted numerous assessment work contests. Annual Report of the Secretary of the Interior, Fiscal Year 1928, page 11. Included in these proceedings were Contest Nos. 11757, 11759, 11761, 12029 and 12039, regarding the placer claims in Civil Actions Nos. 8680, 8685 and 9202. Meanwhile, however, *Krushnic* found its way to the Supreme Court. The decision of the Department was there reversed. The Supreme Court ruled that the Secretary's decision that cessation of assessment work automatically terminates the claim "violates the plain words of the excepting clause of

the Leasing Act." Wilbur v. United States ex rel. Krushnic, supra, 280 U.S. at 318, 50 S. Ct. at 105. The reasoning was that while performance of annual labor "maintains" a claim,

> "the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened * * *" 280 U.S. at 317–18, 50 S. Ct. at 105.

Failure to perform assessment work on a claim located prior to the leasing act, the court concluded, only renders it subject to loss by relocation and is *without effect* so far as the Government is concerned.

> "The owner [of a mining claim] is not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.
>
> "Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omit-

ted. P. Wolenberg, et al., 29 L.D. 302, 304; Nielson v. Champagne Mining & M. Co., 29 L.D. 491, 493, 280 U.S. at 317, 50 S. Ct. at 104–05.

The decision in *Krushnic* did not put at rest the problem of jurisdiction, at least not for the Department. The Department's interpretation was that it prohibited the Government's invalidating mining claims for failure to perform assessment work only where the claimant has resumed the assessment work before "some form of challenge on behalf of the United States to the valid existence of the claim has intervened."[2] The Department then undertook to investigate the validity of oil shale claims upon which assessment work had stopped and had not been resumed. It posted a notice on each such claim. This declared that the United States had taken possession of the land for its exclusive use and benefit. Numerous such notices were posted; many contest proceedings were instituted; and many claims covering hundreds of thousands of acres were declared null and void. Annual Report of the Secretary of the Interior, Fiscal Years 1930, p. 14; 1931, p. 65; 1932, pp. 18, 58; 1933, p. 60.

> "It is the department's view that a challenge of an oil shale claim which is in default for the nonperformance of assessment work, by notice of the preferment of a charge against the claim to that effect in a proceeding instituted in accordance with the regulations of February 26, 1916, Circular No. 460 (44 L.D. 572), while such

[2] The Federal Shale Oil Co., 53 I.D. 213, 220 (1930). See also, Francis D. Weaver, 53 I.D. 175 (1930), On Rehearing, 53 I.D. 179 (1930); Virginia-Colorado Development Corporation, 53 I.D. 666 (1932); State v. Madell, 53 I.D. (1930); Instructions, Government Proceedings Against Oil Shale Claims for Default in Assessment Work, 53 I.D. 131 (1930).

> default continues to exist, and a judgment by the department that the charge is sustained after due notice and opportunity to be heard, has the same effect in the extinguishment of the claim as would a valid relocation of a mining claim located on account of minerals other than those mentioned in the leasing act." The Federal Shale Oil Company, supra, 53 I.D. at 221.

On April 1, 1933, the Department suspended these actions to await "court decisions on [the] jurisdiction of the Department to challenge the validity of oil shale locations for failure to perform annual labor thereon." Annual Report of the Secretary of the Interior, Fiscal Year 1934, p. 65. The litigation referred to was culminated in the Supreme Court's decision in Ickes v. Virginia-Colorado Development Corporation, supra.

In *Virginia-Colorado,* the Court reviewed a decree requiring the Secretary of the Interior to vacate certain adverse proceedings together with his decision declaring certain placer claims of the plaintiff in that case to be void. Plaintiff had alleged that he had located oil shale placer claims on mineral lands of the United States in Colorado in June, 1917. Annual assessment work had been performed for each year through July 1, 1930, but none had been done during 1931 when the Department initiated adverse proceedings challenging the claim for nonperformance of the work and failure to resume prior to the contest proceedings.

The Supreme Court affirmed this decree and in so doing the opinion by Mr. Justice Hughes, declared and clarified several points.

First, the decision reaffirmed the holding in *Krushnic* as to the character of the right acquired. On this it quoted:

"* * * Restating the rule declared by many decisions, we said in Wilbur v. U.S. ex rel. Krushnic, 280 U.S. 306, 316, 50 S. Ct. 103, 104, 74 L. Ed. 445, that such a location, perfected under the law, 'has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term.' It is alienable, inheritable, and taxable."

Secondly, it again spelled out the extent of the Department's authority as follows:

> "There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. [Citing cases]
>
> "The Leasing Act of 1920 inaugurated a new policy. Instead of the acquisition of rights by location, the act provided for leases. But by express provision, the act saved existing valid claims 'thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws.' Section 37 of the Act (30 U.S.C.A. § 193). What then was the status of plaintiff's claims under this exception? They were originally valid claims. No question is raised to the contrary. There is no suggestion of lack of discovery, fraud, or other defect. There is no ground for a charge of abandonment. The allegations of the bill, admitted by the motion to dismiss, dispose of any such contention. Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture. Wilbur v. U.S. ex rel. Krushnic, supra."

Thirdly, it was held that the Saving Clause (Section 37 of the Leasing Act) preserved all rights acquired prior to the enactment of the act, and that the reservation did not enlarge the Department's authority. On this it said:

> "In this view, plaintiff came directly within the exception. The government invokes the new policy of the Leasing Act abolishing the practice of location. But the saving provision of section 37 is a part of the policy of the act. Its terms explicitly declare the will of Congress as to valid existing claims, with full understanding of the status of such claims under the prior law.
>
> "The government refers to the reservation in the opinion in Wilbur v. U.S. ex rel. Krushnic, supra, as to the maintenance of a claim by a resumption of work 'unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened.' But that was a reservation, not a decision, and it does not aid the government in its contention here. To be effective, the 'challenge' to the 'valid existence' of a claim must have some proper basis. No such basis is shown."

The Court's conclusion was that "the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law."

Soon after the decision of the Supreme Court in *Virginia-Colorado,* the Department issued its opinion in The Shale Oil Company, 55 I.D. 287 (1935). This in a sense implemented the Supreme Court's ruling. The appeal to the Secretary was from a Commissioner's denial of patent application. The contention was that the Land Department was without jurisdiction and without legal authority to question a placer claim owner's failure to perform assessment work for any year. The First Assistant Secretary reversed the decision and remanded the case with instructions to reinstate the application and to dispose of it unaffected by default in the performance of assessment labor. In commenting on the *Virginia-Colorado* opinion the Assistant Secretary noted that "the challenge to the valid

existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings and the decision set forth in the Bill went beyond the authority conferred by law."

The Assistant Secretary went even further; he concluded that: "The above-mentioned decisions in the cases of *Francis D. Weaver* and *Federal Oil Shale Company* and other departmental decisions in conflict with this decision are hereby overruled."

Thus, the Department not only clearly recognized its lack of authority to deal with the assessment work problem in the case before it, but also it cleared the record by overruling all prior inconsistent decisions.

There are other evidences that this was and continued to be the viewpoint of the Department many, many years following the *Virginia-Colorado* decisions. The viewpoints of various officials, reflected in the correspondence, show that they believed that prior decisions forfeiting claims for failure to do assessment work were void.[3]

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[3] Letter of Secretary Lane dated October 23, 1918:

"I am in receipt of your letter dated October 2, 1918, and making inquiry as to the necessity for performing annual assessment work on some oil shale lands in Wyoming, which you and associates are claiming under placer mining locations made in 1917 and 1918.

* * * * *

"As a general rule matters involving questions of assessment work on mining claims arise between adverse claimants to the same mineral land and go only to the right of possession, the determination of which is committed exclusively to the courts."

Letter of First Assistant Secretary Vogelsang dated January 20, 1919:

"The annual expenditure on unpatented mining location required under Section 2324 U.S. Revised Statutes, and commonly called annual assessment work, is, with the exception of certain phosphate locations affected by a special act of Congress, solely a matter between rival or adverse claimants to the same

The regulations governing the Bureau of Land Management recognize this proposition also. See 43 C.F.R. § 3420.4 (1966). It provides:

"The annual expenditure of $100 in labor or improvements on a mining claim, required by

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mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts. In other words, the non-performance of assessment work renders the land subject to adverse relocation provided work is not resumed (40 Stat. 343)."

Letter from Commissioner Fred W. Johnson dated June 28, 1935:

"It is possible if you left your claims in 1925 and have not since performed assessment work thereon that they have been relocated, but as also stated in the paragraph referred to, 'The determination of the question of the right of possession between rival or adverse claimants to the same mineral land is committed exclusively to the court.' Matters of trespass, thievery, etc., such as those referred to in your letter, are also committed to the jurisdiction of the court, being punishable only under the laws of the state. As this office has no jurisdiction in the matters mentioned in your letter it will not undertake to advise you in that regard."

Letter from Commissioner Johnson dated July 25, 1935:

"Replying to your letter of July 20, 1935, you are advised that this office has no jurisdiction over questions relating to the performance of annual assessment work on mining claims, such questions being committed exclusively to the courts."

Letter from Under Secretary Chapman dated February 11, 1946:

"The failure to perform the annual assessment work for the benefit of a valid mining location has no effect as against the United States but only renders the claim subject to loss through relocation by another claimant if the work is not commenced or resumed before such relocation. Therefore, the question of whether the work done is of a nature that would be considered assessment work is not one within the jurisdiction of this Department but is for the appropriate court to determine should litigation arise between the claim holder and another claimant making a relocation of the same ground. See Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 [55 S. Ct. 888]."

See also, The Shale Oil Company, supra, pp. 20–21.

section 2324 of the Revised Statutes (30 U.S.C. § 28), is, with the exception of certain phosphate placer locations, validated by the act of January 11, 1915 (38 Stat. 792; 30 U.S.C. 131), under which regulations were issued March 31, 1915 (Circ. 396), 44 L.D. 46, solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."[4]

Similarly, the annual reports of the Secretary of the Interior also reflected the Department's view in this regard.[5] Moreover, the commentators have generally regarded the question as one of jurisdiction.[6]

UNION OIL COMPANY DECISION

We turn now to consideration of the case which marked a reversal of the Department's viewpoint and attitude. In *Union Oil* a number of applicants

[4] See also 37 L.D. 757, 769 (1909); 49 L.D. 15, 73 (1922) showing similar versions of the quoted regulation.

[5] See Report of the Secretary of the Interior, Fiscal Year 1934, page 65, and see also the Statement of Secretary Wilbur before the Senate Committee on Public Lands, given on February 12, 1931.

[6] E.g.:

"Assessment work upon oil-shale claims is governed by the rules of the general mining law and the claimant of a valid location prior in time to the passage of the Leasing Act is not subject to any forfeiture that did not apply to such law. In other words, fulfillment of the annual ownership work each year is not a prerequisite to continuing ownership as against the Government of the United States, and, in the absence of an adverse relocation, work may be resumed at any time." Division of Mines, California Department of Natural Resources, American Mining Law, Vol. 1, § 1051 (1943);

"Only a mining relocation can effect forfeiture, and the Federal Government cannot question the failure to perform assessment work." 2 American Law of Mining, § 7.26 (1964).

for patents to oil shale placer mining claims which had been declared null and void in the contest proceedings during 1930–1933 sought to have patents issued. The Manager of the Land Office denied these efforts. The Secretary, in his exercise of supervisory jurisdiction, submitted the case to the Solicitor of the Department for final decision. The Manager's decision was, of course, affirmed notwithstanding that the Solicitor recognized the invalidity of the 1930–1933 rulings. He noted that failure to perform annual assessment work was not a ground for cancellation of oil shale placer claims by the Government. 71 I.D. at 170. He held, however, that even though the original cancellations were incorrect in law, that nevertheless under the principles of finality of administrative action, estoppel by adjudication, and *res judicata*, these rulings could not be challenged in the year 1962.

The Solicitor's basic assumption in the *Union Oil* decision was that the Supreme Court had not denied the Department's jurisdiction with respect to the subject matter. He also construed *The Shale Oil Company* case, supra, which had overruled all inconsistent decisions, as not reinstating the claims previously declared forfeited. In essence, he determined that the applicants were required to take action to nullify these rulings at the time and that their failure to exercise this initiative constituted something in the nature of an implied acquiescence. The important emphasis in the decision was placed on administrative finality and *res judicata*. Since this decision stands in the way of a recognition of the plaintiffs' rights, we must consider and determine its validity in the light of the Supremt Court decisions and the narrow question is whether the Department had subject matter jurisdiction with respect to performance or nonperformance of assessment work. In support

of his holding that there was such jurisdiction, the Solicitor pointed to the language in *Virginia-Colorado* to the effect that the Secretary had authority by appropriate proceedings to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. From this he concluded that the Department at all times retained jurisdiction; that is, power over these claims. As we view it, this was an unjustified interpretation of the decisions of the Supreme Court. It overlooked the basic nature in terms of property of a mining location. Both *Krushnic* and *Virginia-Colorado* proceeded on a fundamental proposition that this creates a vested property right which can be defeated only by a competitor. Historically, this was the nature and character of the mining claim, and to overlook it is to change a fundamental rule of property. No amount of administrative legerdemain can overcome this fundamental principle.

It is, of course, so fundamental as to require no documentation, that an adjudication by a tribunal lacking subject matter jurisdiction is wholly nugatory, need not be appealed, and can not be *res judicata*. When, as here, the Department acted beyond the authority granted to it by the law, it acted in the particular area beyond its jurisdiction. The Supreme Court told the Department this in language as plain as legal language can be. If *Krushnic* left some unresolved question, *Virginia-Colorado* did not. It is clear from a reading of this opinion that the Court was speaking on the question of the Department's jurisdiction. As to pre-1920 locations, the Court held that they retained the legal status which they had enjoyed prior to the adoption of the Leasing Act. Both of these cases rule that prior to the adoption of this Act the performance of assesssment work

was unnecessary to the preservation of the locator's possessory right against the Government.

Virginia-Colorado clarified beyond question the proposition that the Government has never had a possessory right to pre-Leasing Act mining claims defective only for failure to perform assessment work. It follows from this that the Department is wholly without jurisdiction to inquire into the status of assessment work performance.

It is also noteworthy that there has been no contention here that plaintiff's have abandoned their claims and there is a dearth of evidence to establish acquiescence, express or implied, by plaintiffs in any assumption of jurisdiction by the Department.

It follows, therefore, that the decision in *Union Oil* is contrary to and irreconcilable with the decisions of the Supreme Court of the United States. In so holding we recognize that the Department of the Interior is in good faith advancing a policy. Congress has, of course, granted the Department broad powers to protect public lands and the Department undoubtedly considers itself duty-bound to oppose the instant claims. This Court, however, must follow the law as laid down by the Supreme Court of the United States. It is upon this basis that we conclude that the actions of the Department in assuming jurisdiction over the failure to do assessment work is void and of no effect whatever.

The plaintiffs are directed to submit forms of judgments reflecting the views expressed in this opinion. These judgments should be submitted to defendant for approval as to form.

APPENDIX D

UNION OIL CO. OF CALIFORNIA ET AL.

No. A–29560

Decided April 17, 1964

APPEAL FROM LAND OFFICE DECISIONS

The Union Oil Company of California and others [1] have each appealed to the Director of the Bureau of Land Management from decisions of the Manager of the Colorado Land Office issued on February 16 and 23, 1962. These decisions rejected mineral patent applications for oil shale placer mining claims on lands in Garfield and Rio Blanco Counties, Colorado. The Secretary assumed supervisory jurisdiction because of the importance of the issues involved and assigned the case to the Solicitor for final decision.[2] Since the facts out of which these appeals arise are identical or similar and, since all of the claims involve identical issues and common questions of law, the appeals will be considered together.

The Manager rejected each of the patent applications under consideration on the ground that appellant's mining claims had been declared null and void in adverse proceedings brought by the Government between 1930 and 1933 on the charge of failure to perform annual assessment work. In 1935, in a case not involved in this appeal, the Supreme Court held

[1] The appeal numbers, the names of the appellants, the serial numbers of their patent applications, and the dates of the decisions appealed from are set forth in Appendix A.

[2] Memorandum of the Secretary, May 8, 1962.

that failure to perform annual assessment work was not a ground for cancellation of oil shale placer claims by the Government. *Ickes* v. *Virginia-Colorado Development Corporation,* 295 U.S. 639 (1935). The basis of the Manager's decisions in the present cases was not that the original cancellations were correct as a matter of law at the time they were made, but rather, that "under * * * principles of finality of administrative action, estoppel by adjudication, and *res judicata* * * *," they cannot now be challenged.

As a preliminary matter, the appellants have joined in a motion to vacate the Colorado Land Office Manager's decisions or, in the alternative, to remand these cases for full hearing, after notice, of matters of fact and law relied upon by the Manager in rendering his decisions. The motion is based on assertions which, for the most part, raise the same issues involved in the appeal. The issues raised in the motion will, therefore, be disposed of in this opinion together with the issues raised by the appellants on the appeal.

The decisions of the Land Office Manager are first attacked on the ground that the Department was required by law and regulation to provide a hearing on the questions of fact and law decided by the Manager. It is further asserted that the Manager exceeded his authority in that the decisions rendered by him were tantamount to an adjudication of the validity of the appellant's mining claims, no hearing having been held. This, appellants contend, operates to deprive them of due process of law.

The assertion is then made that the cancellations upon which the Manager based his decisons were of no effect since the Department never obtained personal jurisdiction over the contestees in the original proceedings and, in fact, never actually canceled some

of the claims upon which the present appellants base their applications.

Assuming, *arguendo,* that the Land Office Manager had the authority to decide these cases without providing a *de novo* hearing in each case, the appellants assert that the principles upon which the Manager based his decision are not controlling here. They contend that, so long as he retains jurisdiction over the lands in question, the Secretary may, in the exercise of his supervisory authority, vacate any decision subsequently found to be in error even though the time within which an appeal could be prosecuted has expired. This, the appellants contend, is what occurred when the Secretary decided *The Shale Oil Company,* 55 I.D. 287 (1935), which "overruled" prior departmental decisions canceling oil shale placer claims for failure to perform annual assessment work.

Next, the appellants contend that the doctrine of *res judicata* is not applicable to administrative decisions.

The appellants further assert that the principles of finality of administrative action, estoppel by adjudication and *res judicata* are inapplicable in the present case since the Supreme Court, in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* held that the cancellation of a mining claim upon ground of failure to perform annual assessment work was beyond the jurisdiction and power conferred by law upon the Secretary and that such cancellation is now subject to collateral attack.

Finally, the appellants contend that since *Ickes* v. *Virginia-Colorado Development Corporation, supra,* and *The Shale Oil Company, supra,* the Department has consistently treated the early decisions of the Land Commissioner as being void and of no legal

effect and has at all times prior to February 1962, recognized the validity of the appellants' claims.

EARLY DEPARTMENTAL DECISIONS AND POLICY

Before considering the appellants' contentions, the early decisions and departmental policy regarding oil shale placer claims will be examined briefly.

Prior to 1920, the Department of the Interior held that failure to perform annual assessment work on mining claims[3] rendered the land subject to relocation by others but did not constitute grounds for the Government to cancel such claims. *P. Wolenberg,* 29 L.D. 302 (1899). Thereafter, all oil shale lands were withdrawn from location by the Mineral Leasing Act of February 25, 1920 (41 Stat. 451, 30 U.S.C., sec. 193), subject to the rights of owners of valid mining claims "thereafter maintained in compliance with the laws under which initiated."

In *Emil Krushnic,* 52 L.D. 282 (1927), the Department held that failure to perform annual assessment work was a failure to maintain a claim under the law and automatically subjected the claim to cancellation by the Government. The Supreme Court rejected this theory in *Wilbur* v. *Krushnic,* 280 U.S. 306 (1930), and held that a failure to do assessment work could not be challenged by the Government *following the resumption of work on the claim.*

Following *Wilbur* v. *Krushnic, supra,* the Department took the position that the United States could make a lawful challenge to the validity of an oil shale claim for failure to perform annual assessment labor if such challenge was made *before assessment work was resumed* on the claim.[4] Accordingly, the Land

[3] As required by the Mining Law of May 10, 1872 (Rev. Stat., secs. 2324, 2325; 30 U.S.C., secs. 28, 29).

[4] *Instructions,* 53 I.D. 131 (1930).

Commissioner ordered that new adverse proceedings be commenced on each claim on which there was an actual default and no resumption of the annual labor required by the statute.

However, in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* the Supreme Court declined to accept the Department's theory that oil shale claims could be canceled where assessment work was delinquent and had not been resumed. The Court said that the decision of the Department in canceling these claims "* * * went beyond the authority conferred by law." 295 U.S. at 647.

Shortly thereafter, the Department issued its decision in *The Shale Oil Company,* 55 I.D. 287 (1935), which recalled and vacated the departmental decision in *Virginia-Colorado Development Corporation,* 53 I.D. 666 (1932), and held that all other departmental decisions and instructions which were inconsistent with the decision of the Supreme Court were "overruled." The early decisions canceling the claims now being considered were never reopened, recalled or vacated in proceedings following *The Shale Oil Company, supra.*[5]

[5] With one exception, no appeals were taken from the decisions of the Land Commissioner which canceled the claims in issue here. In one case, the cancellation of the Oyler Nos. 1–4 oil shale placer claims was appealed to the Secretary of the Interior. The cancellation was upheld by the Secretary (*The Index Shale Oil Company,* A–16465 (Mar. 10, 1932)), and the final Departmental decision was not challenged by subsequent court action. The Oyler Nos. 1–4 claims form the basis for an application filed by Pacific Oil Company which was rejected by the Manager in February 1962, and which is included among the rejections on appeal herein.

PROCEDURAL REQUIREMENTS OF DEPARTMENTAL REGULATIONS, THE ADMINISTRATIVE PROCEDURE ACT, AND THE FIFTH AMENDMENT

As stated above, the appellants have joined in a motion to vacate the Land Manager's decisions and/or to remand the case for full hearing on issues of fact and law. The motion is based, in part, on the assertion that the Manager was required to refer the matter to a hearing examiner for a full hearing and that his failure to do so is tantamount to an attempt to invalidate the claims without a hearing of any kind. However, hearings were in fact held in the contest proceedings involving many of the claims included in this appeal [6] and the then-owners of those claims participated in the hearings and preserved their right of appeal.[7] The reapplication for a patent by a claimant after his claim has been contested successfully or after

[6] The following claims were canceled in contest proceedings in which the owners of the claims participated:

Carbon Nos. 1–4 (Colo. No. 030979), canceled in Contest No. 12029

Elizabeth Nos. 1, 2 and 4–12 (Colo. No. 030979), canceled in Contest No. 12029

Southeast (Colo. No. 028751), canceled in Contest No. 12972

Northeast (Colo. No. 028751), canceled in Contest No. 12972

Northwest (Colo. No. 028751), canceled in Contest No. 12972

Oyler 1–4 (Colo. No. 12327), canceled in Contest No. 12039

Jack Pot Nos. 4–11 (Colo. No. 045092), canceled in Contest No. 13038

[7] The applicable Rules of Practices provided as follows: No person who has failed to answer the contest affidavit, or having answered, has failed to appeal at the hearing, shall be allowed to appeal from the final action or decision of the Manager * * * 43 C.F.R., sec. 221.49, 19 F.R. 9056 (1954).

his patent application has been denied does not require the Department to grant a new hearing. (*Gabbs Exploration Co.*, 67 I.D. 160 (1960).) The assertion that a *de novo* hearing is now required is without merit where such cancellations were made in default proceedings in the manner prescribed by applicable departmental regulations,[8] the owners having been properly served with notice of contest and provided an opportunity to challenge the cancellation of the claim. This same contention was raised and rejected by the Department in *Gabbs Exploration Co., supra.* The latter case was upheld on review by the United States District Court for the District of Columbia and affirmed on appeal to the United States Court of Appeals for the District of Columbia Circuit.[9] The opinion by the court contains the following pertinent discussion concerning the adequacy of notice:

> The owners of the * * * claims were not denied due process in the original contests, for it is clear that they had adequate notice of the contest against them, they were offered a hearing, and they were informed of the cancellation of their claims. In view of what we have previously stated, there was no jurisdictional defect in the 1929 contests. * * * 315 F. 2d at 39–40.

As recognized in the *Gabbs Exploration Co.* decision, *supra,* the essential elements of due process are notice and an opportunity to defend against the charges asserted. (*Simon* v. *Craft,* 182 U.S. 427

[8] Circular No. 460, entitled "Manner of Proceeding in Contests Initiated Upon a Report by a Representative of the General Land Office," is reproduced in full and attached hereto as Appendix B. Sections 4, 5 and 6 thereof set forth the form and manner of issuing the notice of contest to the claimant in this class of cases. This Circular was effective at all times relevant here.

[9] *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37 (1963).

(1901); *Cameron* v. *United States*, 252 U.S. 450 (1920)). The failure of the owners of these claims to participate in the contest proceedings of which they had adequate notice and in which they had an opportunity to defend the validity of the claims at a hearing does not entitle such owners or their successors in interest to another opportunity for a hearing on the same question. The fact that an opportunity for a hearing was forfeited by the default of the owners of these claims does not furnish the basis for a claim that due process of law has been denied. (See *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 169 (1932); *Opp Cotton Mills Inc.* v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126, 152 (1941)).

Appellants' assertion that failure to order a new hearing deprived them of due process is, therefore, rejected insofar as notice of contest is found to have been adequate in the original contest proceedings.

In those cases in which the requirements of notice were definitely met prior to the cancellation of the claim, the then owners of the claim having participated in the contest proceedings, the order affirming the decision of the Land Manager will, for reasons set out herein, become effective immediately.

In the remaining cases, the appellants will be granted 60 days within which to submit materials relating solely to their contention that their claims were canceled without compliance with the requirements of notice. Thereupon, a determination regarding the sufficiency of notice will be made. If necessary, hearings will be ordered to resolve any factual questions which remain unresolved on the record. If no such materials are received from these appellants within the 60-day period, they will be considered to have conceded that the Departmental records accu-

rately reflect the facts regarding the issuance of notice in the early contest proceedings and the determination will be made on the basis of the present record.

EFFECT OF THE SHALE OIL COMPANY CASE

Upon the authority of the decision of the Supreme Court in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* the decision of the Commissioner declaring oil shale placer claims forfeited in *The Shale Oil Company, supra,* was reversed by the Department.[10] It was stated in the Department's decision that:

> * * * The above-mentioned decision of the Department in the *Virginia-Colorado Development Corporation* case and in the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of *Francis D. Weaver and Federal Oil Shale Company* and other Departmental decisions in conflict with this decision are hereby overruled. The Commissioner's decision is *reversed* and the record in the case *remanded* with instructions to reinstate the application and entry *in toto* and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clear list the application for patent. (Italics supplied.) 55 I.D. at 290.

The appellants contend that, by overruling all departmental decisions in conflict with *The Shale Oil Company, supra,* the Secretary exercised his supervisory authority to nullify all conflicting decisions of the Land Commissioner including those involved in the present appeal. In other words, it is argued that

[10] *The Shale Oil Company*, 55 I.D. 287 (1935). *The Shale Oil Company* decision had been held up to await the *Ickes* v. *Virginia-Colorado Development Corporation* decision then pending in the Supreme Court.

while the earlier decisions purported to cancel appellants' claims, *The Shale Oil Company, supra,* reinstated or corrected them in accordance with the decision of the Supreme Court in *Ickes* v. *Virginia-Colorado Development Corporation.* We do not agree. This is not what the decision either said or accomplished.

The language in *The Shale Oil Company* case distinguishes those cases actually before the Secretary from those which were not. As to the former, the Commissioner's decisions canceling the claims were expressly *recalled* and *vacated.* The latter were merely "overruled." [11]

The Department of the Interior has often "overruled" former holdings without in any way nullifying the action taken thereunder.[12] To nullify action previously taken by giving retroactive effect to a change in administrative practice or legal ruling does vio-

[11] See *e.g., Francis D. Weaver,* 53 I.D. 175 (1930) and *The Federal Shale Oil Company,* 53 I.D. 213 (1930), both of which were cited in *The Shale Oil Company* and merely "overruled." They have been treated as simply "overruled" ever since. See the cumulative *Table of Modified and Overruled Cases* in the frontispiece of Interior Department Decisions.

[12] See *Instructions,* 35 L.D. 549 (1907). And see *Franco Western Oil Company,* 65 I.D. 427 (1958); *Anna R. Paul,* A-24350 (1947) (upheld by the District Court for the District of Columbia in *Anna R. Paul* v. *Marion Clauson,* Civil No. 3309-48 (unreported)); Solicitor's Op., 58 I.D. 319 (1943); *Timothy Sullivan, Guardian of Juanita Elsenpeter,* 46 L.D. 110 (1917), overruling *Heirs of Susan A. Davis,* 40 L.D. 573 (1912); *Bertha M. Birkland,* 45 L.D. 104 (1916); *Lillie E. Stirling,* 39 L.D. 346 (1910). The rule of prospective operation of administrative rulings has been followed by other Governmental agencies. See generally, *Davis, Administrative Law Treatise,* secs. 5.09 and 17.07.

lence to the settled principle of finality of administrative action. In this regard, the following statement set forth in *Franco Western Oil Company,* 65 I.D. 427 (1958), adequately summarizes the Department's long-standing practice:

> * * * the rule applied by the Department on those occasions when it has specifically considered the question as to whether, because of change in the interpretation of a statute, its holding should have retroactive effect, has been to deny such effect to its decisions. 65 I.D. at 429.

In *Safarik* v. *Udall,* 304 F. 2d 944 (D.C. Cir. 1962), the Court of Appeals for the District of Columbia Circuit upheld the long-standing practice of the Department of the Interior to give prospective application to its decisions. The Court therein stated:

> * * * the Secretary of the Interior * * * should have and does have authority, when he promulgates an interpretive regulation, *or hands down a decision placing a different construction on a statute or regulation, from that laid down in an earlier decision or regulation, to give prospective operation only to the later regulation or decision.* (Italics supplied.) 304 F. 2d at 950.

It is therefore concluded that the departmental decision in *The Shale Oil Company, supra,* merely recalled and vacated the earlier decision in that particular case "* * * thereby depriving the earlier opinion of all authority as as [sic] precedent."[13] It is further concluded that the decision in *The Shale Oil Company, supra,* had no effect on the cases presently before us in this appeal.

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[13] Black, Law Dictionary (4th ed. 1951).

APPLICATION OF THE DOCTRINE OF FINALITY OF ADMINISTRATIVE ACTION

The contention made by appellants that the doctrine of *res judicata* has no application to decisions of administrative agencies is erroneous.[14] The contention that the doctrine of *res judicata* (or its administrative-law counterpart—the doctrine of finality of administrative action) has not been recognized and applied before the Department of the Interior is similarly unsupportable. Since 1883 [15] the Department has consistently held that the doctrine of *res judicata* is applicable to departmental decisions.[16] In 1886, Secretary Lamar stated, in *Rancho San Rafael De La Zanja*, 4 L.D. 482, that:

> * * * Unless the principle of *res judicata* is recognized administrative action may become involved in chaos; the labors of the Department would become too cumbrous to admit of their intelligent discharge; uncertainty would cloud every inchoate title and, in many instances, vested rights would be endangered. 4 L.D. at 482.

In addition to the numerous departmental decisions recognizing the doctrine of administrative action, it

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[14] See generally, 50 C.J.S. *Judgments-Public Officers and Boards*, sec. 606; 2 *Davis, Administrative Law Treatise*, sec. 18.10 and authority cited therein.

[15] See *Meredith* v. *The Atlantic and Pacific Railroad Company*, 2 L.D. 499 (1883).

[16] See, e.g., *Edward Christman*, 62 I.D. 127 (1955); *H. W. Rowley*, 58 I.D. 550 (1943); *Henshaw* v. *Ellmaker*, 56 I.D. 241 (1937); *Charles Perkins*, 50 L.D. 172 (1923); *Lillie M. Kelly*, 49 L.D. 659 (1923); *Fosdick* v. *Shackleford*, 47 L.D. 558 (1920); *Lacey* v. *Grondorf*, 38 L.D. 553 (1910); *Gammon* v. *Weaver*, 26 L.D. 383 (1898); *Mee* v. *Hughart*, 23 L.D. 455 (1896); *Mary C. Stephenson*, 11 L.D. 232 (1890); *A. T. Lamphere*, 8 L.D. 134 (1889); *Higgins* v. *Wells*, 3 L.D. 21 (1884).

has been implemented in the rules of practice before the Department.[17]

The doctrine of *res judicata,* as applied in administrative decisions by this Department, is designed to achieve orderliness in the administration of the public lands as well as finality of decisions which have been closed finally and have not been appealed or otherwise attacked. Every reason of policy which supports the doctrine in the courts is applicable here. There must be an end to administrative litigation also. Public rights as well as private cannot be indefinitely suspended because further litigation may someday be initiated.

In applying the doctrine here, we are aware of the principle, urged so strongly by the appellants, that since the Secretary has a continuing jurisdiction with respect to public lands until a patent issues, he is not estopped by the principles of *res judicata* and finality of administrative action, from correcting or reversing an erroneous decision by his subordinates or his predecessor in office. However, where, as here, the claim has been declared null and void in regular proceedings and the mining claimant acquiesces in such decision for many years, the decision nullifying the claim will be treated as conclusive and will not be reopened in the absence of a legal or equitable

[17] Prior to revision in 1956, 43 C.F.R. sec. 221, provided as follows: No appeal shall be had from action of Director affirming the decision of the manager in any case where the party adversely affected shall have failed to appeal from the decision of said manager. 43 C.F.R. sec. 221.74.

The pertinent portion of the revised regulations provides: *Effect of Failure to Appeal.* When any party fails to appeal from an adverse decision of the Directors that decision shall as to such party be final and will not be disturbed except for fraud or for gross irregularity. 43 C.F.R. sec. 221.10, as revised in Circular 1950, 21 F.R. 1860, March 27, 1956.

basis warranting reconsideration. (*Gabbs Exploration Co.*, 67 I.D. 160 (1960); *Gabbs Exploration Co.*, A–28213 (May 24, 1960) and A–28213 (Supp.) (July 11, 1960); *Garfield County Exploration Co.*, A–28351 (August 30, 1960); *Langdon H. Larwill*, A–28697 (May 16, 1963). Nor does the fact that the legal basis for the decision has later been held by the court of appeals or the Supreme Court to be erroneous require a reconsideration and reversal of cases finally decided before the change in the interpretation or application of the law. (See *e.g.*, *Edward Christman*, 62 I.D. 127 (1955); *Lillie M. Kelly*, 49 L.D. 659 (1923); and *Mee* v. *Hughart*, 23 L.D. 455 (1896)).

In *Lillie M. Kelly, supra*, the Department of the Interior had canceled homestead entries after the issuance of the receiver's receipt. Kelly did not appeal from the decision and acquiesced therein for five years or more. In similar proceedings in another case (*Thomas J. Stockley*, 44 L.D. 178 (1915)), the decision of the Secretary was challenged in a suit in equity and appealed eventually to the Supreme Court. The Court, in *Stockley* v. *United States*, 260 U.S. 532 (1923), held that:

> The action of the Commissioner of the General Land Office, therefore, in directing a contest against Stockley's entry three years after the issuance to him of the receiver's receipt, *was unauthorized and void.* (Italics supplied.) 260 U.S. at 544.

Following the Supreme Court's decision in the *Stockley* case, Mrs. Kelly applied for an unrestricted patent claiming the earlier contest against her entry was "unauthorized and void." The Department's decision contains the following pertinent statement:

> * * * The Department has held that a decision made in accordance with the practice prevailing at the time it was rendered, if accepted

> by the parties affected as final, will not be reopened for the reason that the practice then prevailing *has subsequently been held erroneous by the Supreme Court.* (Italics supplied.) 49 L.D. at 662.

The principle upon which the Department relied in canceling numerous oil shale placer claims was declared by the Supreme Court to be erroneous and beyond the authority conferred by applicable statutes. *Ickes* v. *Virginia-Colorado Development Corporation, supra.* The early decisions in the cases presently before the Secretary were not appealed and the Department has not vacated them. They were acquiesced in by those adversely affected for over 25 years. "The fact that * * *" the principle on which these earlier decisions are based is "* * * now held by the Supreme Court to be erroneous is not deemed a sufficient reason for reversing and annulling decisions which have become final." *Mee* v. *Hughart, supra.*

JURISDICTION OF THE LAND COMMISSIONER AND EFFECT OF ICKES V. VIRGINIA-COLORADO DEVELOPMENT CORPORATION

The appellants contend that the Supreme Court, in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* held that the Department of the Interior was without jurisdiction to cancel claims for failure to do assessment work. Of course, no adjudication can be said to be *res judicata* if it was rendered by a tribunal not having jurisdiction.[18] But the Court did

[18] Compare, *Best* v. *Polk*, 85 U.S. (18 Wall.) 112 (1873), with, *Minter* v. *Crommelin*, 59 U.S. (18 How.) 87 (1855). And compare, *Doolan* v. *Carr*, 125 U.S. 618 (1887), with, *Quinby* v. *Conlan*, 104 U.S. 420 (1882). And see, *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902).

not hold that the Department lacked jurisdiction. To the contrary, it was held that:

> There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that is was subject to cancellation by reason of abandonment.[19] 295 U.S. at 645.

And on the question of the Secretary's authority to cancel for failure to perform assessment work, the Court stated:

> We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. 295 U.S. at 647.

It is on the basis of this language that appellants contend that the Secretary was without jurisdiction to challenge these claims. A close examination of that language, the history of the litigation and related decisions require the rejection of appellants' contention.

Earlier, in *Wilbur* v. *Krushnic,* 280 U.S. 306 (1930), the Court had concluded that the Department could not cancel claims upon the ground of failure to do assessment work following the resumption of work. The Court did not deny the Secretary's jurisdiction. In fact, it affirmed his full authority to consider the case but found that he had "* * * interpreted and applied a statute in a way contrary to its explicit terms * * *."[20] In explaining the effect of the Sec-

[19] Citing *Cameron* v. *United States*, 252 U.S. 450, 460 (1920); *Cole* v. *Ralph*, 252 U.S. 286 (1920); *Black* v. *Elkhorn Mining Co.*, 163 U.S. 445, 450 (1896); *Brown* v. *Gurney*, 201 U.S. 184, 192, 193 (1906); *Farrell* v. *Lockhart*, 210 U.S. 142, 147 (1908).

[20] 280 U.S. at 319.

retary's error in construing the statute,[21] *Roberts* v. *United States,* 176 U.S. 221 (1900), was quoted as follows:

> * * * Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. * * * 176 U.S. at 231.[22]

A clear analogy exists in the principles applicable to the public lands. *Cameron* v. *United States,* 252 U.S. 450 (1920). In the *Cameron* case the Court stated:

> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. 252 U.S. at 459–60.[23]

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[21] The Mineral Leasing Act of 1920, 41 Stat. 451, 30 U.S.C., sec. 193.

[22] See also, *United States ex rel. Ness* v. *Fisher,* 223 U.S. 683 (1912); and *Decatur* v. *Pauling,* 39 U.S. (14 Pet.) 497 (1840).

[23] Citing Rev. Stat., secs. 441, 453, 2476; *United States* v. *Schurz,* 102 U.S. 378, 395 (1880); *Lee* v. *Johnson,* 116 U.S. 48, 52 (1885); *Knight* v. *United States Land Ass'n.* 142 U.S. 161, 177, 181 (1891); *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316 (1903). The nature and extent of the Department's jurisdiction over the disposition of public lands, and particularly under the mining laws, was more recently discussed in *Duguid* v. *Best,* 291 F. 2d 235 (9th Cir. 1961), in the following terms:

It is undisputed that the Congress has granted to the Secre-

And further:

> True, The Mineral Land Law does not itself confer such authority on the land department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the land department. 252 U.S. at 461.[24]

These principles were most recently reiterated by the Supreme Court in *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 337 (1963).

In *United States* v. *Winona & St. P.R. Co.*, 67 Fed. 848 (8th Cir. 1895), aff'd., 165 U.S. 463 (1897), the Court of Appeals set forth the following test for determining whether the Land Department has jurisdiction over the subject matter with which it purports to deal:

> * * * Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and determine whether or not they are sufficient to invoke the exercise of that power. *The test of jurisdiction is whether the tribunal has power to enter upon*

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tary of the Interior general supervisory authority over public business relating to public lands, including mines.

"* * * there can be no question as to the power and authority of the Secretary of the Interior, under the grant of authority to supervise public business on public lands, including mines, to initiate through the subordinate Bureau of Land Management a contest in order to see "that valid claims on public land may be recognized, invalid ones eliminated, and the rights of the public preserved." 291 F. 2d at 241.

[24] See also *Cole* v. *Ralph*, *supra*, fn. 19; *Farrell* v. *Lockhart*, *supra*, fn. 19; *Brown* v. *Gurney*, *supra*, fn. 19; and *Black* v. *Elkhorn Mining Co.*, *supra*, fn. 19. And see generally, *Standard Oil Co. of California* v. *United States*, 107 F. 2d 402 (9th Cir. 1940).

the injuiry, not whether its conclusion in the course of it is right or wrong.[25] (Italics supplied.) 67 Fed. 959–60.

Having concluded that the Secretary or the Land Commissioner had jurisdiction over the subject matter of the claims presently in dispute, and that they had the necessary authority to enter upon the inquiry as to the validity of the claim, we have only to determine the ultimate effect of an error of law committed by these officials in the exercise of this authority. In this regard, we do not question that the appellants or their predecessors in interest could have invoked judicial review of the Department's decisions under applicable precedent,[26] even though the time within which

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[25] See also, *United States* v. *Northern Pac. R. Co.*, 95 Fed. 864 (8th Cir. 1899), aff'd., 177 U.S. 435 (1900); and *Foltz* v. *St. Louis & S.R. Ry. Co.*, 60 Fed. 316 (8th Cir. 1894). And see *King* v. *McAndrews*, 111 Fed. 860 (8th Cir. 1901), wherein the court stated the principle as follows:

"The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. [Citations] Hence a patent evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with the power, and charged with the duty, to decide, is as impervious to collateral attack as one which is the result of correct conclusions." 111 Fed. at 864.

[26] See e.g., *El Paso Brick Co.* v. *McKnight*, 233 U.S. 250 (1914), wherein the court held that an order erroneously issued by the Department refusing a patent for a mining claim could not deprive the claimant of vested rights "* * * [f]or while the General Land Office had power of supervision over the acts of the local officers, and could annul entries obtained by fraud or made without authority of law, yet *if the Department's cancellation was based upon a mistake of law, its ruling was subject to judicial review when properly drawn in question in judicial proceedings*, inasmuch as the power of the land office is not unlimited, nor can it be arbitrarily exercised so as to deprive any person of land lawfully entered and paid for." 233 U.S. at 257–58. (Italics supplied.)

the claimants could have appealed to the Secretary had expired. The claimants, following the decision in *Ickes* v. *Virginia-Colorado Development Corporation*, *supra*, had at least two alternatives open to them to protect their claims. They could have petitioned the Secretary to exercise his supervisory authority to recall and vacate the Land Commissioner's cancellation of the claim as he had done in *The Shale Oil Company, supra*, or they could have sought relief in the courts in proper proceedings instituted for that purpose.[27] The claimants did neither.

Since the judicial relief which was available to the claimants was equitable in nature, it was incumbent upon them to seek judicial relief within a reasonable time after the Supreme Court, in the *Virginia-Colorado Development Corporation* case, had determined that the cancellations by the Department were erro-

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[27] See e.g., *Sanford* v. *Sanford*, 139 U.S. 642 (1891); *Shepley* v. *Cowan*, 91 U.S. 330 (1875); *Silver* v. *Ladd*, 74 U.S. (7 Wall.) 219 (1868).

In *Sanford* v. *Sanford*, *supra*, the court said:

"* * * where the matters determined are not properly before the department, or its conclusions have been reached from a misconstruction, by its officers, of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, *then the courts, can in a proper proceeding*, interfere and control its determination so as to secure the just rights of parties injuriously affected." (139 U.S. at 647.) (Italics supplied.)

See also, *Moffat* v. *United States*, 112 U.S. 24 (1884); *Bernier* v. *Bernier*, 147 U.S. 242 (1893); *Moore* v. *Robbins*, 96 U.S. 538 (1877); *Johnson* v. *Towsley*, 80 U.S. (13 Wall.) 72 (1871); *Lindsey* v. *Hawes*, 67 U.S. (2 Black) 554 (1862); *Lytle* v. *Arkansas*, 63 U.S. (22 How.) 193 (1859); *Garland* v. *Wynn*, 61 U.S. (20 How.) 6 (1857); *Barnard's Heirs* v. *Ashley's Heirs*, 59 U.S. (18 How.) 43 (1855); *Cunningham* v. *Ashley*, 55 U.S. (14 How.) 377 (1852).

neous. Otherwise, the claimants' judicial remedy would be subject to the equitable defenses of estoppel and laches unless it were clearly shown that the decision of the Department was void *ab initio*.

When, as here, the administrative officer has acted within his jurisdiction and a judicial review of such action has not been sought on a timely basis, the principles of estoppel, laches and *res judicata* are merged in the doctrine of finality of administrative action and are operative to bar appellants' claim for relief. This conclusion is in accord with the principles set forth in the several recent cases discussed above, all of which involved oil shale placer claims.[28] The following language, used by the court in *Gabbs Exploration Co.* v. *Udall, supra,* in rejecting similar claims, is particularly pertinent here:

> Here neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plaintiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years. Here twenty-seven years have elapsed between the alleged wrong (1929) and plaintiffs attempt to have it corrected (1956). There might be some reason to impel the Secretary to reopen a prior decision in order to purge an incorrect determination, but the passage of time might prevent or greatly hinder a proper determination of the initial question, in which case it would be inappropriate for him

[28] See *Langdon H. Larwill*, A–28697 (May 16, 1963); *Gabbs Exploration Co.*, 67 I.D. 160 (1960); aff'd. *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37 (D.C. Cir. 1960); *Garfield County Exploration Co.*, A–28351 (August 30, 1960); *J. C. Nelson*, 64 I.D. 103 (1957). See also, *Charles D. Edmonson*, 61 I.D. 355 (1954), and cases cited therein.

> to reopen the case even though he retains jurisdiction over the land in dispute * * * 315 F. 2d at 41."[20]

It is evident that the Secretary or the Land Commissioner, in the *Krushnic* case, in the *Virginia-Colorado Development Corporation* case, and in the cases before us in this appeal, had the duty, the responsibility and, necessarily then, the jurisdiction to construe the statute. The construction placed upon the statute was appealed in *Krushnic* and in *Virginia-Colorado Development Corporation,* and the contention of the appellant that the Secretary erred was upheld. However, in the cases before us, appellants cannot complain after nearly 30 years of silence, inaction, and acquiescence. Neither they nor their "* * * predecessors in interest took timely action to have the wrong righted * * *." *Gabbs Exploration Co.* v. *Udall,* 315 F. 2d at 41.

PAST ADMINISTRATIVE PRACTICE

Finally, the appellants contend that, following the decision in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* and until the Manager's decision in February, 1962, rejecting their applications, the United States has consistently recognized the validity of the subject mining claims. They contend that there has been a long-standing, continuous and consistent

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[20] The court also observed that:

The Department of the Interior, which has recognized the right of the Secretary to reconsider certain prior decisions, has also recognized that there must be some time limit on such reconsideration. As Assistant Attorney General Van Devanter said in *Aspen Consolidated Mining Co.* v. *Williams,* 27 L.D. 1, at 11:

"The parties remain the same and the one complaining of the former decision has taken timely and decisive action to have the alleged wrong corrected." 315 F. 2d at 40–41.

administrative interpretation and application of the *Virginia-Colorado Development* case beginning with the Department's decision in *The Shale Oil Company, supra.* In this regard, the appellants rely upon certain letters written by officers of the Land Department which expressed the view that the previous decisions of the Land Commissioner canceling oil shale placer claims were void and had no effect on the claim.[30]

The argument advanced by the appellants is not based on the facts. While some officials of the Department may have expressed the view that the original cancellations were void and of no effect, at the same time, action was taken with respect to the subject land which was entirely inconsistent with the recognition of valid and subsisting claims.

On April 15, 1930, pursuant to Executive Order No. 5327, all oil shale deposits owned by the United States were withdrawn, subject to valid existing

[30] The following documents were submitted by the appellants as evidence of the Department's position:

1. Letter of July 29, 1935, from the Commissioner of the General Land Office to the Register, Denver, Colorado (attached as Appendix C–1).

2. Letter of April 22, 1936, from Ida Dere, Grand Valley, Colorado (then owner of the Lucy Agnes Nos. 1–2 oil shale placer claims), to the Commissioner, General Land Office (attached as Appendix C–2).

3. Letter of May 4, 1936, from the Commissioner, General Land Office, to Ida Dere, Grand Valley, Colorado (attached as Appendix C–3).

4. Letter of July 4, 1944, from the Commissioner, General Land Office, to Mr. W. Porter Nelson, Denver, Colorado (attached as Appendix C–4).

5. Letter from the Commissioner, General Land Office, to Mr. Edward Altenbern, DeBeque, Colorado (attached as Appendix C–5).

6. Letter of October 31, 1935, from the Acting Secretary of the Interior to the Secretary of the Navy (attached as Appendix C–6).

352-158—69——7

rights, from lease or other disposal, except for application for patent under the mining laws for metalliferous mining claims or application based on claims initiated prior to the date of the withdrawal. The withdrawn lands were reserved for purposes of investigation, examination and classification. See *Instructions,* Circular No. 1220, 53 I.D. 127 (1930). Among the lands included in the withdrawal are those here under consideration as indicated in the instructions dated April 22, 1931, from the Commissioner of the General Land Office to the Register, Denver, Colorado, which listed among the subdivisions in Colorado covered by Executive Order No. 5327 all of secs. 7 to 36, T. 4 S., R. 99 W., 6th P.M.

Executive Order No. 5327, above-mentioned, attached to the lands here under consideration as a secondary claim and operated to withdraw them from the public domain when the determination that the mining claims were null and void for failure to do assessment work became final, since, on the termination of the mining locations, possessory title to the lands reverted to the United States. See *Cameron* v. *United States,* 252 U.S. 450 (1920); *Gabbs Exploration Company,* 67 I.D. 160, 169 (1960); and Solicitor's Opinion, 55 I.D. 205, 208 (1935). And see, *Vanadium Corporation of America, et al.,* A–26914 (September 8, 1954). As a result of the decisions of the Land Commissioner in 1930 and 1931 declaring these claims null and void for failure to do assessment work, Executive Order No. 5327 was operative to exclude all subsequent entries thereon, except as permitted by the order.

On February 6, 1933, Executive Order No. 6016 authorized the issuance of oil and gas leases under the Mineral Leasing Act on lands withdrawn by Executive Order No. 5327.

Pursuant to the later Executive Order, the Department has issued numerous oil and gas leases and the rights of the third party lessees have intervened. Some of the oil and gas leases are still outstanding and proceedings have been instituted under the Multiple Mineral Development Act (Act of August 13, 1954, as amended (30 U.S.C., sec. 527)), to determine the rights as between oil shale placer claimants and lessees under oil and gas leases issued by the United States. Such proceedings have been suspended pending the outcome of the subject appeals.

The important point here is that, on many of the tracts in question, the United States, acting largely by and through this Department, has, for some 25 years since the cancellation of the oil shale placer claims, exercised exclusive control over the land and has permitted third parties to acquire rights therein. In view of these facts, the assertion on appeal that the United States or the Secretary of the Interior has recognized the validity of these mining claims and has not taken action which is inconsistent therewith, is without support.

But even assuming, *arguendo,* that a long-standing continuous and consistent departmental recognition of these claims is shown, such a showing would not entitle the appellants to patents on these claims. For reasons heretofore stated, the validity of these claims was not established by the decision of the Department in *The Shale Oil Company* case, *supra,* nor by any subsequent administrative or judicial action, and any administrative practice to the contrary would have been clearly erroneous. Administrative practice, however long-standing and consistent, is not controlling when it is clearly erroneous. *County of Marin* v. *United States,* 356 U.S. 412 (1958); *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946);

Burnet v. *Chicago Portrait Co.*, 285 U.S. 1 (1932); *Webster* v. *Luther*, 163 U.S. 331 (1896); *Merritt* v. *Cameron*, 137 U.S. 542 (1890); *United States* v. *Graham*, 110 U.S. 219 (1884); *Swift Company* v. *United States*, 105 U.S. 691 (1881). And see Solicitor's Opinion, 68 I.D. 372 (1961), and cases cited herein.

Furthermore, the application of doctrine of administrative practice or construction is "* * * restricted to cases in which the construction involved is really one of doubt *and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance.*" *Studebaker* v. *Perry*, 184 U.S. 258, 269 (1902).[31] [Italics supplied.] Here the appellants have attempted to demonstrate the existence of a long-continued practice by this Department in recognizing the validity of their claims. In support thereof, they have submitted the documentation abovementioned.[32] Yet there is no clear showing that any of the appellants knew of or relied upon any of these documents at the time they acquired an interest in their claims. Indeed, it appears that the existence of such documents became known to the appellants only after their claims were challenged and their patent applications rejected by the Land Manager in 1962. Under these circumstances, no rights have accrued to the appellants by reason of the alleged departmental practice.

SUMMARY

In summary, we have found (1) that the Secretary and his duly authorized agent, the Land Commissioner, had jurisdiction to enter upon inquiry as to the validity of oil shale placer claims under the applicable statutes; (2) that they had the jurisdiction

[31] See generally, Annot., 73 L. Ed. 322 (1928), and, Annot., 84 L. Ed. 28 (1939).

[32] See footnote 30, *supra*.

to construe such statutes in defining their authority; (3) that in the exercise of this function they may have erred in canceling claims including some of the claims upon which the patent applications in the present case are based; (4) that these cancellations were not appealed from by the appellants or their predecessors in interest; (5) that neither the appellants nor their predecessors in interest sought to attack these decisions for over 25 years. We conclude that, on the principles of *res judicata,* finality of administrative action, and laches, the said decisions of the Land Commissioner and the Secretary of the Interior are binding on the parties thereto and their successors in interest insofar as these claims were actually canceled in the original contest proceedings in which the then-owners of the claims were properly served with notice of contest and provided an opportunity for a hearing respecting the validity of the claim.

As heretofore mentioned, the following claims were canceled in contest proceedings in which the then-owners of the claims participated, thus eliminating any question concerning the sufficiency of or defects in the issuance of notice:

Claim	Patent application	Contest
Carbon Nos. 1-4	Colo. No. 030979	No. 12029
Elizabeth Nos. 1, 2, 4-12	Colo. No. 030979	No. 12029
Southeast	Colo. No. 028751	No. 12972
Northeast	Colo. No. 028751	No. 12972
Northwest	Colo. No. 028751	No. 12972
Oyler Nos. 1-4	Colo. No. 012327	No. 12059
Jack Pot Nos. 4-11	Colo. No. 045002	Nos 13038

As to these claims, the decisions of the Land Manager rejecting applications for patents are hereby affirmed.

As to all other claims involved in this appeal, the final order affirming or reversing the decision of the Land Manager will be held in abeyance pending a determination of the sufficiency of notice of contest in the contest proceedings in which the claims were canceled. The appellants holding such claims who wish to pursue the contention that their claims were canceled without compliance with the requirements of notice, are hereby granted 60 days within which to submit materials relating solely to such contention. Thereupon, a determination regarding the sufficiency of notice will be made and a final order entered on the appeal. If necessary, hearings will be ordered to resolve any factual questions which remain unresolved on the record. Appellants who do not submit such materials shall be considered to have conceded that the departmental records accurately reflect the facts regarding the issuance of notice in the contest proceedings and the determination will be made on the basis of the present record.

This decision is rendered and the action herein set forth is taken pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348).

FRANK J. BARRY,
Solicitor.

APPENDIX A

Appeal No.	Appellant	Colorado Serial No.	Manager's decision
A-2660	Union Oil Co. of California	07667	Feb. 16, 1962
		09072	Feb. 16, 1962
	Pacific Oil Company	012327	Feb. 16, 1962
	Weber Oil Company	014671	Feb. 16, 1962
	Tell Ertl	016334	Feb. 16, 1962
	Tell Ertl	016671	Feb. 16, 1962
	Henry L. Price		
	Silmon Smith		
	Charles Holmes		
	Gabbs Exploration Company	018673	Feb. 23, 1962
	Dwight S. Young	022459	Feb. 16, 1962
	John W. Savage	022460	Feb. 16, 1962
	Charles H. Prien	022461	Feb. 16, 1962
	Barnette T. Napier	028751	Feb. 16, 1962
	Grace A. Savage		
	Maude B. Farnum		
	John W. Savage		
	John R. Farnum, Jr		
	St. Clair Napier Catlin		
	William H. Farnum, Jr		
	Joan L. Savage		
	Neil S. Mincer		
	Energy Resources Technology Land, Inc	029427	Feb. 16, 1962
		029428	Feb. 16, 1962
		031342	Feb. 16, 1962
	Wasatch Development Company		
	Joseph B. Umbleby	030979	Feb. 16, 1962
	John W. Savage	034270	Feb. 16, 1962
		034271	Feb. 16, 1962
	Harlan H. Hugg	045002	Feb. 16, 1962
	Dorothy D. Hugg		

APPENDIX B

[Circular No. 460]

Manner of Proceeding in Contests Initiated Upon a Report by a Representative of the General Land Office

Washington, D.C., *February 26, 1916.*

To Special Agents, and Registers and Receivers, United States Land Offices:

The following rules are prescribed for proceedings in contests initiated upon a report by a representative of the General Land Office. All existing instructions in conflict herewith are superseded:

1. The purpose hereof is to secure speedy action upon claims to the public lands, and to allow claimant, entryman, or other claimant of record, opportunity to file a denial of the charges against the entry or claim, and to be heard thereon if he so desires.

2. Upon receipt of a report this office will consider the same and determine therefrom whether the facts stated, if true, would warrant the rejection or cancellation of the entry or claim.

3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges in the manner and form hereinafter provided for, which notice must be served upon the entrymen and other parties in interest shown to be entitled to notice.

4. The notice must be written or printed and must refer to the letter from this office by initial and date, as authority for issuing the notice, and must state fully the charges as contained in said letter; also the number of the entry or claim, subdivision of land involved, name of entryman or claimant or other known parties in interest.

5. The notice must also state that the charges will be accepted as true, (*a*) unless the entryman or claimant files in the local office within thirty days from receipt of notice a written denial, under oath, of said charges, with an application for a hearing, (*b*) or submits a statement of facts rendering the charges immaterial, (*c*) or if he fails to appear at any hearing that may be ordered in the case.

6. Notice of the charges may in all cases be served personally upon the proper party by any officer or person or by registered letter mailed to the last address of the party to be notified, as shown by the record, and to the post office nearest to the land. When it is necessary to serve notice on the unknown heirs of a person in interest, the same must be addressed to that person at his address of record and also at the post office nearest the land. Proof of personal service shall be the written acknowledgement of the person served or the affidavit of the person who served the notice, attached thereto, stating the time, place, and manner of service. Proof of service of notice by registered letter shall consist of the report of the register and receiver who mailed the notices, accompanied by the post office registry return receipts, or the returned unclaimed registered letters.

7. If a hearing is asked for, the local officers will consider same and confer with the Chief of Field Division relative thereto and fix a date for the hearing, due notice of which must be given entryman or claimant. The above notice may be served by registered mail. By ordinary mail, a like notice will be sent to the Chief of Field Division.

8. The Chief of Field Division will duly submit, upon the form provided therefor, to this office, an estimate of the probable expense required on behalf of the Government. He will also cause to be served subpoenas upon the Government witnesses and take such other steps as are necessary to prepare the case for prosecution.

9. The Government must appear with its witnesses on the date and at the place fixed for said hearing, unless there is reason to believe that no appearance on behalf of the Government will be required. The officer in charge of hearings must, therefore, keep advised, as far as possible, as to whether the defendant intends to appear at the hearing. The Chief of Field Division may, when present, conduct the hearing on behalf of the Government.

10. If the entryman or claimant fails to deny the charges under oath and apply for a hearing, or to submit a statement of facts rendering the charges immaterial, or fails to appear at the hearing ordered without showing good cause therefor, such failure will be taken as an admission of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof, and the register and receiver will forthwith forward the case with recommendation thereon to the General Land Office and notify the parties by registered mail of the action taken. In cases finally closed upon default of claimant if application to reopen any case is filed with the register and receiver they will forthwith forward same with recommendations to the General Land Office.

11. Upon the day set for the hearing and the day to which it may be continued the testimony of the witnesses for either party may be submitted, and both parties, if present, may examine and cross-examine the witnesses, under the rules, the Government to assume the burden of proving the charges, unless otherwise ordered.

12. If a hearing is had, as provided in paragraph 11, the local officers will render their decision upon the record, giving due notice thereof, in the usual manner. When decision is adverse to the Government, notice thereof must be sent to the Chief of Field Division.

13. Appeals or briefs, if filed, must be in accordance with the rules, but need not be served upon the Chief of Field Division or Government representative in charge of the hearing.

14. The above proceedings will be governed by the rules of practice. All notices served on claimants or entrymen must likewise be served upon transferees or mortgagees.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

APPENDIX C-1

JULY 29, 1935.

REGISTER,
Denver, Colorado.

SIR: July 10, 1930, adverse proceedings were directed against the validity of the Liberty No. 1, Oil Shale Placer, SE., Sec. 22, T. 2 S., R. 95 W., 6th P.M. on the charge that annual assessment work was not performed on the claim for the year ending July 1, 1930, and that work has not been since resumed.

After notice issued and answer denying the charges was duly filed, hearing was duly before a United States Commissioner at Glenwood Springs, Colorado, on June 11, 1932, at which the Government appeared by attorney and no other appearances were noted. April 12, 1933, you transmitted the record to this office without decision.

On June 3, 1935, the Supreme Court decided in the case of Ickes vs. Virginia-Colorado Development Corporation, that the United States has no right to declare oil shale placers null and void because of failure on the part of the claimants to perform annual assessment work thereon, and on June 24, 1935, the Department in the case of the Shale Oil Company, Denver, mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case, and overruled its previous decisions in conflict with the Supreme Court's decision.

From the foregoing it is clear that the adverse proceedings in this case are invalid for any purpose. Accordingly, contest No. 11823 is dismissed and the case is closed. Advise the parties hereof.

Several contest cases involving oil shale placers are now pending in your office. In view of the decisions referred to hereinabove, you are instructed to close out on your records and transmit to this office all contest cases involving solely the question of a failure to perform annual assessment work, and failure to resume work on

oil shale placers prior to the date of a challenge by the United States to the valid existence of the claim, where no answer has been filed by the claimants. In all cases involving only the question of annual assessment work where answer has been filed by any of the contestees you will transmit the records to this office without action.

You will retain in your files, subject to further instructions from this office all contest cases involving oil shale placers wherein charges have been made involving other questions than that above stated, even if a charge has also been made in that regard.

In your response hereto refer to this letter by date and number.

Very respectfully,

(Sgd.) FRED W. JOHNSON,
Commissioner.

APPENDIX C–2

BOX 477, GRAND VALLEY, COLORADO,

April 22, 1936.

COMMISSIONER GENERAL LAND OFFICE,
Washington, D.C.

Please advise the undersigned, Ida Dere, why Lucy Agness Oil Shale Claims Nos. 1 and 2 (being N½, N½ and S½N½, Sec. 4, Township 5 South. R 95 West) should not be clear listed from the charge of failure to do and perform annual assessment work. Being contest No. 11750, in keeping with and per tenor of your letter dated 7/29/35, which ordered the clear listing of Liberty Oil Shale Claim No. 1, being contest No. 11823 addressed to Register of Denver Land Office. These two claims were valid existing claims on 2/25/20, with several years assessment work having since been done. The field Division Inspectors convinced me on or about the year 1927 or 28, that it would be useless to go to the expense of answering the Government contest, but the Supreme Court Decision of 6/3/35, seemingly has set at naught all of these former challenges, where the only question was lack of assessment work. Please clear list my said claims or advise me what must be done to get them clear listed.

Yours respectfully,

(Sgd.) IDA DERE.

APPENDIX C–3

MAY 4, 1936.

IDA DERE,
Box 477, Grand Valley, Colorado.

MADAM: Replying to your letter of April 22, 1936, you are advised the records of this office show that the Lucy Agnes Nos. 1 and 2 oil shale placers were declared null and void by this office on August 18, 1933, because of failure of the owners of the claims to file answer denying the charge that annual assessment work had not been performed on the claims for the year ending July 1, 1929, and that work had not been since resumed.

On June 3, 1935, the Supreme Court of the United States held in the case of Ickes vs. Virginia-Colorado Development Corporation, that the oil shale placer claimant, a party in that case, lost no rights by failure to do annual assessment work on its claims and that such failure gave the Government no right to declare the claims null and void. It further held that proceedings brought by the Government based solely on such a charge went beyond the authority conferred by law and did not affect the validity of the claims. In view of this holding of the Supreme Court, this office considers that it would be unnecessary to revoke its previous decision holding the Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the title arising from the location of the claims.

Very respectfully,

(Sgd.) FRED W. JOHNSON,
Commissioner.

APPENDIX C–4

JULY 4, 1944.

Mr. W. PORTER NELSON,
607 California Building, Denver 2, Colorado.

MY DEAR MR. NELSON: I have your letter of June 15 asking for the present status of the contest No. 12478 directed against the Sid Nos. 1 to 22 oil shale placer locations by our letter No. 1069641 of July 16, 1930.

The letter referred to directed new adverse proceedings against the locations mentioned on the charge "That annual assessment work to the value of $100 was not performed upon each or any one of the Sid Nos. 1 to 22 inclusive, oil shale placers for the year ending July 1, 1930, and that work has

not been since resumed." The letter also directed service of notice of the charge on E. B. McNair and George W. Habberset, the record title holders of the locations.

On September 16, 1930, answer was filed in the Denver Land Office by E. B. McNair in which no denial is made of the allegations contained in the charge, but contestee contended that the Sid Nos. 1 to 22 claims having been located prior to the leasing act of February 25, 1920, constituted valid claims existent February 25, 1920, and maintained in compliance with the laws under which they were initiated, etc.

By our letter of June 24, 1931, to the Register it was stated that as the answer merely objected to the charge wihout denying the allegations therein, the contestees were allowed 30 days from notice in which to file a proper answer or appeal to the Secretary of the Interior and that if no action was taken within the time allowed the locations would be declared null and void without further notice. On August 25, 1931, the Register reported no action taken and transmitted evidence of service consisting of registry return receipt signed by E. B. McNair July 24, 1931. Accordingly, by our letter of October 12, 1931, to the Register, the locations were declared null and void as to the interest therein of E. B. McNair and the Register was directed to serve new notice of the decision of July 16, 1930, on George W. Habberset. The records show that such notice was served October 24, 1931, and in his letter of December 1, 1931, the Register reported that no answer was filed by Habberset within the time allowed. Accordingly by our letter of January 7, 1932, to the Register it was held that "The failure of the contestee to file answer denying the charge is taken as an admission by him of the truth thereof, in view of which the Sid Nos. 1 to 22, inclusive, oil shale placer locations are declared null and void in their entirety and the United States has taken possesison of the land within the claims for its own uses and purposes." The case was also closed by that letter.

However, in the case of the Shale Oil Company (55 I.D. 287) the Department held in view of the decision of the Supreme Court in the case of The Virginia-Colorado Development Corporation (295 U.S. 639) that the adverse proceedings in that case, based on charges of failure to do annual assessment work must be held as without authority of law and void.

Very truly yours,

(Sgd.) FRED W. JOHNSON,
Commissioner.

APPENDIX C-5

JULY 17, 1935.

Mr. EDWARD ALTENBERN
De Beque, Colorado.

MY DEAR SIR: Replying to your letter of June 25, 1935, addressed to the Register of the United States land office, Denver, Colorado, and referred here for reply, you are advised that on June 3, 1935, the Supreme Court of the United States held in the case of Ickes, Secretary of the Interior, vs. Virginia-Colorado Development Corporation that the oil shale claimant lost no rights by failure to do the annual assessment work on its claims, that such failure gave the Government no right to declare the claims null and void, and that the proceedings brought by the Government against the claims, based solely on that ground, went beyond the authority conferred by law and did not affect the validity of the claims.

In view of that decision the Department, on June 24, 1935, in the case of the Shale Oil Company, Denver mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case and overruled all its previous decisions in conflict with the decision of the Supreme Court.

You are, therefore, advised that so far as the jurisdiction of this office is concerned, any declaration by it that an oil shale placer claim is null and void based solely on a charge that the claimant failed to perform annual assessment work or resume work on the claim is void and does not affect the right of the owner of the claim to maintain his possession thereof under the mining laws.

However, so far as this office is able to determine from its records, it has never declared null and void any oil shale placers covering the land embraced in your homestead entry, as to such entry which is now pending, should you make satisfactory final proof thereon you will be entitled to a patent if all be found regular, in the absence of any contest or protest by any other parties making claim of a right to the land superior to yours. Your entry is the only claim of record on the tract books of the land office and if any other persons claim the land it is incumbent on them to contest the entry, and should they do so the burden of proof that they have valid claims which have not been abandoned would be upon them.

In the event your homestead entry should be canceled after contest and hearing because of conflict with prior valid mining claims, you would have the right to apply for repayment of all fees and

commissions paid by you in connection with your entry but no reimbursement will be made by the United States for any expenditures on improvements made for any purposes on the entry. So far as this office is concerned, no objection would be made by it to the removal of any such improvements by a homestead entryman after cancellation of his entry, but this should not be taken as authority for the removal of structures which are part of the realty in violation of state laws and of the rights of other parties.

Very respectfully,

(Sgd) FRED W. JOHNSON,
Commissioner.

APPENDIX C–6

OCTOBER 31, 1935.

The Honorable The SECRETARY OF THE NAVY.

MY DEAR MR. SECRETARY: Reference is made to the letter of November 1, 1933, of Secretary Ickes, containing a list of oil shale placer mining claims, with descriptions of the land involved, situated within Naval Oil Shale Reserves Nos. 1 and 3 in Colorado and No. 2 in Utah, involved in adverse proceedings, and the status of each case.

The adverse proceedings involving all of the said claims were based upon a charge that annual assessment work had not been performed upon the claims or claims involved for a stated assessment year and that work had not been resumed thereon. You were informed in the above-mentioned letter that certain claims had been declared null and void in their entirety and others had been declared null and void to the extent of the interests of the parties served with notice, and that further action in all pending cases involving the question of assessment work on oil shale placers was suspended in this office pending a final decision in the courts upon the matter of the authority of this Department to attack the validity of oil shale placer claims upon the ground stated.

On June 3, 1935, the Supreme Court, in the case of *Ickes* vs. *Virginia-Colorado Development Corporation*, held that the United States is without authority to challenge the validity of an oil shale placer claim on account of failure to perform the annual assessment work, or to resume work, thereon. All previous action taken upon such charges in the cases referred to therefore is without effect and void. The status of the claims so far as this Department is concerned is that they are subsisting

claims which, if located on valid discoveries of mineral by qualified locators, segregate the land against its subsequent withdrawal for Naval Oil Shale Reserves unless the claims have been abandoned.

Sincerely yours,

CHARLES WEST,
Acting Secretary of the Interior.

U.S. GOVERNMENT PRINTING OFFICE: 1980

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No. 1057

IN THE

Supreme Court of the United States

October Term, 1968

WALTER J. HICKEL, SECRETARY
OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF OF JOSEPH B. UMPLEBY, ET AL. IN OPPOSITION

FRED M. WINNER
500 Capitol Life Center
Denver, Colorado 80203

Ray F. Perry Co., Denver, Colo.

INDEX

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	2
CONCLUSION	7

CITATIONS

Cases:

Callanan Road Co. v. United States, 345 U.S. 5507, 512 2

Cameron v. United States, 252 U.S. 450, 459 2

Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639 (1935) 2, 3, 4, 5, 6

Payne v. Central Pacific Railway Co., 255 U.S. 228, 236 2

Wilbur v. United States ex rel Krushnic, (1930) 280 U.S. 306 ..... 2, 4, 5, 6

Interior Decisions:

The Shale Oil Company, (1935) 55 I.D. 287 ..... 2, 5, 6

Union Oil Company of California, et al., 71 I.D. 169 6

Statutes:

43 C.F.R. §3420.4 5

No. 1507

IN THE

Supreme Court of the United States

October Term, 1968

WALTER J. HICKEL, SECRETARY
OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF JOSEPH B. UMPLEBY, ET AL IN OPPOSITION

QUESTION PRESENTED

This Court has twice emphatically ruled that the Secretary was without authority to void a claim for failure of the mineral locator to perform annual assessment work on an oil shale mining claim. The question is whether every claimant was required to bring a separate lawsuit attacking the Secretary's unlawful action? Stated another way, could the mineral locators rely upon this Court's two pro-

nouncements and upon the Secretary's recognition of the fact that he was without subject matter jurisdiction to declare a forfeiture for failure of annual assessment work?

STATEMENT OF THE CASE

In the lower Court, four cases were consolidated for trial. Joseph B. Umpleby, et al, were plaintiffs in one of those cases, and the trial Court found: that they had located certain oil shale mining claims in 1918; that these claims were the subject of a contest proceeding in 1929, and that the claims were declared invalid in that proceeding for failure to perform annual assessment work. (App. c, p. 25a) Shortly thereafter, this Court decided *Wilbur v. United States ex rel Krushnic*, (1930) 280 U. S. 306, and later, (1935) *Ickes v. Virginia-Colorado Development Corporation*, 295 U. S. 639. Immediately following *Virginia-Colorado*, the opinion in *The Shale Oil Company* (1935), 55 I.D. 287, was issued, and that Departmental decision commented on *Virginia-Colorado* as follows:

> ". . . the challenge to the valid existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings and the decision set forth in the Bill went beyond the authority conferred by law."

ARGUMENT

1. The government seemingly admits that if *Virginia-Colorado* held, as it manifestly does, that the Secretary was without power to cancel for lack of assessment work, the decision below is correct. Surely this Court has repeatedly held that where agency action exceeds the power granted the agency, the action is void. *Cameron v. United States*, 252 U. S. 450, 459; *Callanan Road Co. v. United States*, 345 U. S. 507, 512; *Payne v. Central Pacific Railway Co.*, 255 U. S. 228, 236. In the words of the Tenth Circuit, these consolidated cases are indeed "like a voice out of the past . . . with the clearly established legal propositions directly applicable to them . . . thought to be at rest." App. A. p.

16a, 406 F. 2d 765. Since 1930, everyone, including petitioner's predecessors in office, have thought that the law was settled that although failure to perform annual assessment work might subject a claim to relocation, such a failure gave the Department no right to declare a forfeiture, and all thought that the Mineral Leasing Act of 1920 made no change in that rule.

Virginia-Colorado holds:

> "The Leasing Act of 1920 inaugurated a new policy. Instead of the acquisition of rights by location, the Act provides for leases. But by express provision the act saved existing valid claims 'thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws.' Section 37 of the Act (30 U.S.C. §193). What then was the status of plaintiff's claims under this exception? They were originally valid claims. No question is raised to the contrary. There is no suggestion of lack of discovery, fraud or other defect. There is no ground for a charge of abandonment. The allegations of the bill, admitted by the motion to dismiss, dispose of any such contention. Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture.
>
> . . . *The Department's challenge, its adverse proceeding, and the decision set forth in the bill went beyond the authority conferred by law.*" [emphasis supplied.]

This language hardly supports petitioner's present contention that *Virginia-Colorado* was dismissed for failure to state a cause of action. *Virginia-Colorado* was decided on the broad issue of power, and nothing has happened in the meantime to increase the Secretary's subject matter jurisdiction in this area.

It is to be remembered that in *Virginia-Colorado* there "was no suggestion of lack of discovery, fraud or other defect," and there was "no ground for a charge of abandonment." The Secretary in effect here urges that there should be a wholesale finding of abandonment, illogically

grounded upon the mineral claimant's reliance on the decisions of this Court holding that the claimant loses nothing because of lack of assessment work. However, the Secretary overlooks the trial judge's finding that there was "no contention here that plaintiffs have abandoned their claims and there is a dearth of evidence to establish acquiescence, express or implied, by plaintiffs in any assumption of jurisdiction by the Department." (App. C, p. 46a).

The Secretary argues that as a matter of administrative convenience the rights of all oil shale claimants should be destroyed in a single mass carnage. In so contending, the Secretary must surely overlook that he is asking for wholesale destruction of vested property rights, and that *Krushnic* said an identical oil shale claim was, "property in the fullest sense of the term. It is alienable, inheritable, and taxable." And, the Secretary must overlook the practices of his predecessors in office who (as noted by the lower Court) followed a totally different policy: "The record shows that this policy was expressed in correspondence, public statements, annual reports, and in official action. This official action includes the patenting of a substantial number of oil shale claims during this interval which had been previously cancelled by the Department for failure to do assessment work." (App. A, p. 11a). Perhaps more important, the trial judge found that "the Department not only clearly recognized its lack of authority to deal with the assessment work problem in the case before it, but also it cleared the record by overruling all prior decisions." (App. c, p. 41a).

In *Krushnic* in 1930, and in *Virginia-Colorado* in 1935, this Court decared that the Mineral Leasing Act made no change in the rule that failure to do assessment work did not open a claim to a declaration of forfeiture in favor of the government. For a third of a century Congress has known of these decisions, and Congress, which has the exclusive authority to amend the statute on which the decisions are founded, has taken no action. Congress could

have, and it now can, impose the risk of forfeiture on a mining claimant of Leasing Act minerals who fails to perform his assessment work; but, unless *Wilbur v. United States ex rel Kushnic*, supra, and *Ickes v. Virginia-Colorado Development Corp.*, supra, are to be overruled, these claims, which are "property in the fullest sense of the terms," cannot be nullified by the Secretary for lack of assessment work. This is so because the claimants "lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture." *Ickes v. Virginia-Colorado Development Corp.*, supra.

Although, as we have said, Congress could change the law, this Court has twice held that the Secretary's general supervisory powers over the public lands do not extend to confiscation of property rights because of lack of assessment work, and any effort on his part so to do go "beyond the authority conferred by law." In hearings which must follow, some claims may be declared invalid on the ground of abandonment; some may be declared invalid on the ground of fraud and some may be declared invalid on other proper grounds, but each claimant is entitled to his day in court and each is entitled to due process of law in attempting to patent his claim.

2. To argue, as does petitioner here, that claimants are guilty of laches is to argue against all logic and reason. To be guilty of laches, a person must knowingly permit another to assert a claim against him. Here, the claimants knew only that this Court had twice held that the Secretary was without subject matter jurisdiction and that the Secretary had recognized and followed those decisions of this Court. Claimants knew that others whose claims had been illegally cancelled for lack of assessment work had been granted patents thereafter in accordance with the mandate of *Krushnic* and *Virginia-Colorado*, and claimants knew of the decision in *The Shale Oil Company*, supra. Claimants also knew of 43 C.F.R. §3420.4 having to do with assessment work and of its language that the matter of assess-

ment work is, "solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts." Claimants certainly had no reason to anticipate the Departmental decision in *Union Oil Company of California, et al* 71 I.D. 179, which, as was said by the trial court, "marked a reversal of the Department's viewpoint and attitude." (App. C. p. 43a.)

In a nutshell, petitioner's argument is that the mineral claimants' rights should be forfeited because they were guilty of relying on this Court's decisions and on the published pronouncements of the Department that any Departmental efforts to cancel for lack of assessment work were "without authority of law and void." *The Shale Oil Company*, supra.

Laches cannot come into play unless and until there is some known claim made against a person, and Union Oil Company marked the first such claim here. The appeal of that decision was immediate. Moreover, of course, delay cannot give life to a void act, and the Secretary's attempted cancellation was void.

3. The decisions of this Court in *Krushnic* and in *Virginia-Colorado* were not wrong. The arguments made by petitioner here as to the correctness of these decisions are the same arguments twice before rejected by this Court. Petitioner argues that there should be finality in administrative decision, but, much more important, there should be finality in judicial decision. To give heed to the government's present position would place in jeopardy well settled principles of property law and would forfeit countless property rights acquired in reliance on what all have believed to be the law of the land. If there is to be change in th law, that change must be effected by Congress to apply in futuro. Congress has found no reason to amend the statute. although since 1930, it has been settled law that failure to do assessment work does not open to forfeiture Mineral Leasing Act claims.

CONCLUSION

No reason for granting the petition for writ of certiorari has been shown. None exists. The petition should be denied.

FRED M. WINNER
500 Capitol Life Center
Denver, Colorado 80203
Attorney for Joseph B. Umpleby, et al

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

WALTER J. HICKEL, SECRETARY OF THE INTERIOR,

Petitioner,

vs.

THE OIL SHALE CORPORATION, ET AL.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF BARNETTE T. NAPIER, ET AL. IN OPPOSITION

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INDEX

	Page
ARGUMENT	1

CITATIONS

Cases:

Ickes v. Virginia-Colorado Development Corporation, (1935) 295 U.S. 639	2
Wilbur v. United States ex rel Krushnic, (1930) 280 U.S. 306	2

NO. 1507

IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1968

WALTER J. HICKEL,
Secretary of the Interior,

Petitioner,

vs.

THE OIL SHALE CORPORATION,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF BARNETTE T. NAPIER, ET AL.
IN OPPOSITION

ARGUMENT

The Petition for Certiorari previously filed herein by the government by its terms seeks review of a single judgment entered by the United States Court of Appeals for the Tenth Circuit on February 4, 1969, in favor

of the Oil Shale Corporation, et al.[1] However, argument advanced by the government in support of its Petition runs generally to four separate cases which were consolidated for trial and appeal in the lower courts, including the case involving plaintiffs Barnette T. Napier, et al. Since four separate judgments were entered by the trial court and were affirmed by four separate judgments of the Court of Appeals, it is submitted that the petition is procedurally deficient under this Court's Rule 23(j) to present properly for review the judgment entered by the Court of Appeals in favor of plaintiffs Barnette T. Napier, et al. Accordingly, the petition should be denied insofar as these plaintiffs are concerned, or alternatively it should be noted that only the one case is the subject of this petition.

If this Court rules that the petition is sufficient procedurally to present all four judgments for review, then these plaintiffs submit that it should be dismissed on its merits for the reason that the lower court's decisions constitute perfectly proper application of the mining law as previously enunciated by this Court in Wilbur v. United States ex rel Krushnic (1930) 280 U.S. 306 and in Ickes v. Virginia-Colorado Development Corp. (1935) 295 U.S. 639. Since the case and the law pertinent

[1]At page 1 and Appendix B of the Petition reference is made only to the judgment entered in Civil Action No. 9581, Udall v. The Oil Shale Corporation, et al.

thereto is well stated in both lower court opinions, these plaintiffs are content to rely upon them at this stage in the proceedings and will not take the time of this Court to repeat what is contained therein.

Respectfully submitted,

GAIL L. IRELAND
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Denver, Colorado 80202

Attorney for
Barnette T. Napier, et al.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

WALTER J. HICKEL, Secretary of the Interior,

Petitioner,

—v.—

THE OIL SHALE CORPORATION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Jurisdiction and Opinion Below of the District Court	2
Statutes and Regulations Involved	2
Questions Presented	4
Statement	5
The Origin of the Mining Claims in Suit	6
Interior's Investigation and Challenge of Oil Shale Claims	8
Interior's Response to the Prior Decisions of This Court	13
The Department's Change of Position	20
The Issues in the Courts Below	20
Reasons Why the Petition Should Be Denied	22
Conclusion	35

TABLE OF AUTHORITIES

CASES:

Costello v. *United States*, 365 U.S. 265	30
Fribourg Navigation Co. v. *Commissioner*, 383 U.S. 272	34
Gabbs Exploration Co. v. *Udall*, 315 F.2d 37, *cert. denied*, 375 U.S. 822	9
Gutierrez v. *Waterman Steamship Corp.*, 373 U.S. 206	30

PAGE

Ickes v. *Virginia-Colorado Development Corp.*, 295 U.S. 639 ..... 12, 13, 22-25, 32

Lane v. *Hoglund*, 244 U.S. 174 34
Logan v. *Davis*, 233 U.S. 613 34

Northern Pac. Ry. v. *Boyd*, 228 U.S. 482 30

United States v. *Etcheverry*, 230 F.2d 193 29
United States v. *Leslie Salt Co.*, 350 U.S. 383 34

West v. *Standard Oil Co.*, 278 U.S. 200 25-26
Wilbur v. *Krushnic*, 280 U.S. 306 ..... 6, 10, 22-24

INTERIOR DECISIONS:

The Clipper Min. Co. v. *The Eli Min. & Land Co.*, 34 L.D. 401 7

David W. Harper, 74 I.D. 141 7

Emil L. Krushnic, 52 L.D. 282 10

Emil L. Krushnic (On Rehearing), 52 L.D. 295 10

The Shale Oil Company, 55 I.D. 287 ..... 15, 27

Standard Shales Prod. Co. (On Rehearing), 53 I.D. 42 24

Union Oil Company of California, 71 I.D. 169 ..... 5, 14, 20, 26-27, 31

Union Oil Company of California, Supplemental Decision, 72 I.D. 313 ..... 22, 23

Virginia-Colorado Development Corp., 53 I.D. 666 24

PAGE

STATUTES AND REGULATIONS:

Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. 22 *et seq.* .. 6-7

Act of July 20, 1956, 70 Stat. 592, 30 U.S.C. 122 29

Mineral Leasing Act, 30 U.S.C. 181 *et seq.* 6

Multiple Mineral Development Act of 1954, 68 Stat. 708, 30 U.S.C. 521-531 .....9, 29

30 U.S.C. 28 7

30 U.S.C. 30 25

Instructions, 47 L.D. 548 8

Regulations, 37 L.D. 757 4

Regulations, 49 L.D. 58 4

43 C.F.R. § 3420.4 25

MISCELLANEOUS:

H. Rep. No. 2198, 84th Cong., 2d Sess. 29

S. Rep. No. 1610, 83rd Cong., 2d Sess. 29

S. Rep. No. 2524, 84th Cong., 2d Sess. 29

Tertiary Geology and Oil-Shale Resources of the Piceance Creek Basin Between the Colorado and White Rivers Northwestern Colorado, U.S.G.S. Bulletin 1082-L 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 221

WALTER J. HICKEL, Secretary of the Interior,

Petitioner,

—v.—

THE OIL SHALE CORPORATION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

At the outset it is necessary to note a lack of clarity as to the scope of the Petition. The opinion of the court of appeals below covered four separate civil actions (App. 1a-5a),[1] and that court entered four separate judgments which affirmed four separate judgments of the district court. The argument in the Petition mentions all four cases as if review were sought of all. However, had that been intended, then pursuant to this Court's Rule 23(j) the Petition would have set forth all four judgments. In fact, the Petition entirely omits the judgments in three of the cases, Nos. 9582, 9583, and 9584 in the court of appeals, and includes only the judgment in No. 9581 (the *"TOSCO"* case).[2] This brief is submitted on be-

---

[1] References to "App." are to the Appendices to the Petition.

[2] The two references at page 1 of the Petition to "the judgment" likewise suggest an intention to obtain review only of one case.

half of the oil shale claim owners in that case, and on behalf of the owners in No. 9584 (the *"Brown"* case), without conceding that the latter case is properly before this Court.

Jurisdiction and Opinion Below of the District Court

In view of the omission from the Petition of the following information called for by paragraphs 1(a) and 1(g) of Rule 23 of this Court, respondents note that the opinion of the district court (App. C to the Petition) is reported at 261 F. Supp. 954, and that the bases for federal jurisdiction in the district court were 28 U.S.C. 1331, 1361 and 2201 and 5 U.S.C. 701-04.

Statutes and Regulations Involved

1. *The General Mining Act of 1872.* The Act of May 10, 1872, 17 Stat. 91, sections 22, 26, 28, and 29 of Title 30, U.S.C. provides as follows:

> "[A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

> "The locators of all mining locations made on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as

they comply with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment . . . ."

"On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year . . . . [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner . . . . The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States supervisor of surveys that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors . . . ."

2. *The Mineral Leasing Act of 1920.* The Act of February 25, 1920, 41 Stat. 445, sections 241 and 193 (the excepting clause) of Title 30 U.S.C., provides as follows:

"The Secretary of the Interior is authorized to lease . . . any deposits of oil shale belonging to the United States . . . ."

"The deposits of . . . oil shale . . . herein referred to, in land valuable for such minerals . . . shall be subject to disposition only in the form and manner provided in section . . . 241 . . . of this title, except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

3. *Interior Department Regulations.* Section 3420.4 of Title 43, C.F.R. (1969), provides as follows:

> "The annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes (30 U.S.C. 28), is, with the exception of certain phosphate placer locations, validated by the act of January 11, 1915 (38 Stat. 792; 30 U.S.C. 131), under which regulations were issued March 31, 1915 (Circ. 396), 44 L.D. 46, solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."

This regulation has long been in effect. See *e.g., Regulations,* 37 L.D. 757, 769 (1909); *Regulations,* 49 L.D. 58, 73 (1922).

Questions Presented

The single question presented in the Petition consists of or comprises the following more particular questions, which Respondents submit as more accurately reflecting the terms and circumstances of the actions below.

1. Whether under federal statutes governing the disposition and management of public land, the Department of the Interior had subject matter jurisdiction with respect to the performance of annual work on unpatented mining claims (so-called "assessment work") so that it could invalidate such claims for a default in performance of such work.

2. Whether, on the assumption that Interior had jurisdiction but erroneously interpreted the statutes in declar-

ing mining claims invalid for default in performance of annual work, the owners of the claims are now barred by laches from obtaining judicial relief from such legal error.

3. Whether this Court should now overthrow the established construction of the statutes, including that in two unanimous decisions of this Court, that default in performance of annual work does not terminate a mining claim.[2]

Statement

The Statement in the Petition misconceives the actions taken in the present and prior proceedings and the facts established by the evidence admitted at the trial in the district court, and omits many material facts, thereby necessitating this response.

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[2] The Petition does not raise the following questions, all of which have been presented below: Whether after losing two test cases in this Court on the assessment work question, Interior itself took remedial action to render ineffective prior administrative decisions purportedly cancelling oil shale claims, including those involved here, for failure to perform assessment work. Whether from 1935 until the 1960's Interior promulgated and consistently maintained and applied a rule that those assessment work decisions were ineffective. Whether the assessment work decisions purportedly cancelling the *TOSCO* claims were defective for failure to obtain personal jurisdiction of some of the owners. Whether *Union Oil Company of California*, 71 I.D. 169 (1964), could possibly constitute a decision invalidating the *TOSCO* claims, inasmuch as those claims were not involved in *Union Oil*. Whether *Union Oil* is procedurally defective, and thus an ineffective adjudication, even as to the claims that *were* involved in it, in that the claim owners who were parties were given neither notice of the issues upon which the decision was rested nor opportunity for a hearing to present evidence in defense of their rights.

The Origin of the Mining Claims in Suit

The decision below concerns oil shale mining claims located in northwestern Colorado pursuant to the mining laws prior to enactment in 1920 of the Mineral Leasing Act. That Act withdrew oil shale, and the other enumerated minerals,[4] from claim location and patent under the mining laws and as to them substituted a leasing system, expressly preserving, however, pre-existing valid claims. Under the mining laws thus applicable to the claims in suit, as "established by innumerable decisions of this Court" (*Wilbur* v. *Krushnic*, 280 U.S. 306, 316), the location of a mining claim in conformity with the law

> "has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States... The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent" (*id.* at 316-317).

The free grant of property thus provided for by statute arises upon the discovery of a valuable mineral and the location of the claim, that is, the marking off of the claim on the ground and, where required by state law, the filing of a certificate of location in the county office for real estate records. As the Department of the Interior has long recognized, there is not, and never has been, provision for

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[4] Originally coal, phosphate, sodium, oil and gas.

any filing of a notice of a mining claim in any Federal office, and the claim itself comes into existence without any application to or intervention by any Federal department.[5] It is the statute and not the Department which grants the public property to the citizen who complies with its terms.

The statutory scheme thus distinguishes between the possessory right for mining purposes that arises from a valid mining claim and the complete fee simple title that arises from patent to the owner of the claim from the United States. This latter title is obtained only upon application therefor to the Department of the Interior and the satisfaction of the statutory requirements for patent, including evidence that at least $500 worth of work has been performed for the benefit of each claim for which patent is sought. The claim owner has never been obliged to apply for patent, but if a claim owner who has not obtained patent does not perform at least $100 of work annually on his claim (assessment work), he runs the risk that it may be relocated by another for the same or some other mineral. 30 U.S.C. 28.

Against this background the claims in suit were located at various dates between 1915 and 1920, when interest in oil shale in the so-called Green River Formation in northwestern Colorado and adjacent parts of Utah and Wyoming was aroused by a complex of circumstances given dramatic underscoring by the First World War: the dependence of modern society on oil, the obviously finite quantity of conventional well petroleum, the extraordinary richness and thickness of the oil shale strata of the Green

[5] *David W. Harper*, 74 I.D. 141, 150 (1967); *The Clipper Min. Co.* v. *The Eli Min. & Land Co.*, 34 L.D. 401, 410 (1906).

River Formation,[6] the contemporary success of the Scottish oil shale industry, and various steps taken by the United States Government which gave dimension to the economic value of the Green River Formation—*e.g.*, the classification by the United States Geological Survey of the oil shale lands as mineral lands on account of their oil shale value and the segregation of portions of the area in Naval Oil Shale Reserves. Shortly after enactment of the Mineral Leasing Act, the first application for patent to oil shale claims in Colorado came before the Department for adjudication and the Department formally ruled that oil shale of the Green River Formation was a valuable mineral within the meaning of the mining law capable of patent (*Instructions*, 47 L.D. 548 [1920]), and issued the first of many oil shale patents.

Interior's Investigation and Challenge of Oil Shale Claims

During the latter 1920's the Department inaugurated a campaign to investigate oil shale claims in the Green River

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[6] Investigations subsequent to enactment of the Mineral Leasing Act have shown that the early evaluations of the oil content of the richest portion of the Formation, the so-called Piceance Creek Basin in Colorado, were very conservative. It has since appeared that the subterranean deposits in the center and north-central parts of the Basin are vastly thicker and richer than those exposed on the cliffs at the southern margin. *E.g.*, *Tertiary Geology and Oil-Shale Resources of the Piceance Creek Basin Between the Colorado and White Rivers Northwestern Colorado*, U.S.G.S. Bulletin 1082-L (1961), pp. 867-68. Because the valid location of a mining claim requires an exposure of the mineral, claim location focused on the southern portion of the Basin where the claims in suit lie, and the richer portion was never the subject of oil shale claims. This portion, which is unencumbered Federal land so far as pre-1920 oil shale claims are concerned, contains more than 80% of the estimated oil content of the oil shale in Colorado (Deft. Ex. L, R. 893, 7547 in No. 9581). It is unaffected by this litigation.

Formation and, where grounds therefor existed, to challenge the claims in administrative contest proceedings (Pl. Ex. 2, R. 1514; Pl. Ex. 3, R. 1516).[7] The grounds upon which contests were brought included not only such familiar bases for questioning the validity of any mining claim as lack of a discovery, abandonment[8] and fraudulent location, but also the ground that the claim had been forfeited to the United States for failure to perform at least $100 of assessment work in each year since enactment of the Mineral Leasing Act (Pl. Ex. 5, R. 1522-23; Deft. Ex. A, R. 882, 6015). This last ground was asserted by the Department on the basis of the Mineral Leasing Act of 1920. The Government argued that because it had a continuing proprietary interest in leasing the lands and because the Mineral Leasing Act had eliminated the possibility of a relocation of oil shale claims,[9] the consequence of a default in performance of annual assessment work should be automatic termination of the claim in favor of the

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[7] Each of the four cases below is represented by a separate record. However, at the trial the evidence common to the four cases was entered only in the record of the *TOSCO* case and thus is to be found in the record of No. 9581 in the court of appeals. Except as otherwise noted, references to the record below or to "R." are to the record in the court of appeals in No. 9581.

Plaintiffs' Exhibits 1-307 were all received in evidence together at R. 863, subject to objection to individual exhibits. Those relatively few objections were uniformly overruled, R. 918-934. Accordingly, record references hereafter to any of these exhibits omit the page at which they were admitted to avoid repetition of the identical reference.

[8] See *Gabbs Exploration Co.* v. *Udall*, 315 F.2d 37 (D.C. Cir.), *cert. denied*, 375 U.S. 822 (1963), for an example of a decision on grounds including abandonment.

[9] *But see* the Multiple Mineral Development Act of 1954, 30 U.S.C. 521-531.

Government, whether or not the work had been resumed prior to the contest. This position was sharply contested by oil shale claimants, but the Department purported to cancel the claims for non-performance of the work. *Emil L. Krushnic,* 52 L.D. 282 (1927); *On Rehearing,* 52 L.D. 295 (1928).

Following the first Departmental decision in *Krushnic,* the Commissioner of the General Land Office directed the commencement of proceedings in Contests 11757, 11759 and 11761 against the Bute, Camp Bird, and Atlas claims, respectively, involved in the *TOSCO* case below on the single charge of a failure to do assessment work (Pl. Ex. 8, R. 1554-55; Pl. Ex. 10, R. 1558-59; and Pl. Ex. 12, R. 1562-63). On that same ground the Commissioner on May 4, 1928, declared the claims null and void (Pl. Ex. 9, R. 1556-57; Pl. Ex. 11, R. 1560-61; and Pl. Ex. 13, R. 1564-65). Contest 12039 against the four Oyler claims involved in the *Brown* case below was similarly initiated in 1929 on the assessment work ground (Pl. Ex. 14, R. 1566-67; Pl. Ex. 244, R. 2255), but before any decision in that contest, this Court in *Wilbur* v. *Krushnic,* 280 U.S. 306, unanimously held that the Secretary's decision in the *Krushnic* case, *supra,* was "contrary to [the] explicit terms" of the Mineral Leasing Act (*id.* at 319). This Court rejected the argument that the Mineral Leasing Act conferred upon the Government the status of a rival locator, and stated that a mining claim was maintained, within the meaning of the excepting clause of the Mineral Leasing Act, by resumption of assessment work "unless at least some form of challenge on behalf of the United States to the valid existence of the claim" intervened before resumption of the work.

The Department regarded *Krushnic* as a test case.[10] Following that decision the Department accordingly recognized that the pre-*Krushnic* decisions against the *TOSCO* claims were "not tenable" (Pl. Ex. 25, R. 1597) and similarly that further proceedings on the pre-*Krushnic* complaint against the *Brown* claims would be "ineffective" (Pl. Ex. 37, R. 1621; Pl. Ex. 38, R. 1622-23).

As Secretary Wilbur stated, "in order to test out the extent of authority (if any) left to us by the Supreme Court decision,"[11] the Department promptly renewed the assessment work campaign on modified lines. The new theory was that if the Land Office behaved as a rival locator, and moved to take advantage of a continuing default in annual work before the work was resumed, it could thereby terminate an oil shale claim. Accordingly, new field investigations were conducted and, where it appeared that annual work continued in default, three kinds of action were taken. First, a hopefully timely and effective "challenge" was asserted by posting on each claim a printed notice that the annual work was in default and that, during such default, the United States had taken possession of the claim. Second, a proceeding was brought, by the filing and service of a contest complaint alleging the facts in the first step. Third, a decision was rendered declaring the claim null and void.

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[10] Secretary Wilbur testified as follows before the Senate Committee on Public Lands, 1931: "As to oil shale land, the question of the Department's jurisdiction was, when I took office, under review by the Courts in the case of *Wilbur* v. *Krushnic*. The decision of the Court of Appeals in that case had held on January 7, 1929, that the Department was without authority . . . . The Supreme Court decision in that case came down on January 6, 1930, affirming the Court of Appeals . . . in that test case" (Pl. Ex. 47, R. 1667).

[11] *Loc. cit. supra*, note 10.

In embarking upon this second phase of the assessment work campaign, the Department recognized that its subject matter jurisdiction was in question, and that a second test case would be taken to the courts.[12] When that test case (*Virginia-Colorado*) was taken to court, the Department in 1933 suspended the entire annual work campaign to await the outcome. The Department's Annual Report for 1934 explained that the annual work campaign had been suspended "awaiting court decision on *jurisdiction* of the Department to challenge the validity of oil-shale locations for failure to perform annual labor thereon" (emphasis supplied) (Pl. Ex. 44, R. 1653).[14]

Before Interior suspended the second phase of the assessment work campaign, and in accordance with the revised post-*Krushnic* procedures, the Commissioner of the General Land Office directed renewed proceedings against the *TOSCO* and *Brown* claims. It had proceeded to investigate anew the claims in controversy here, to post chal-

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[12] Interior's statement of September 29, 1930 (Pl. Ex. 19, R. 1583) noted that "the right of the department to challenge locations . . . for failure to do assessment work has been vigorously denied by oil shale claimants . . . . [T]here are now pending in the department test cases which the locators asserted they plan to take into court." Interior's Annual Report for 1930 noted that *Krushnic*, although it "sustained the claimants on the issue of assessment work . . . left the possibility (though no certainty) that if the remaining claims were posted before resumption of work on the claim, a different result would follow . . . . A second test case in the courts may be expected" (Pl. Ex. 15, R. 1568).

[13] After the trial court ruled in favor of the *Virginia-Colorado* claimant, Secretary Ickes emphasized to the Attorney General the importance of obtaining appellate review, saying the case "may be regarded as a test case" (Pl. Ex. 43, R. 1651-52).

[14] Similarly, action on a pending appeal within Interior was suspended "in view of the pendency of [*Virginia-Colorado*] challenging the authority of the Department" with respect to assessment work (Pl. Ex. 45, R. 1658).

lenges on them, to bring contest proceedings against them, and to declare, in 1930-1932, some, but not all, undivided interests in them null and void.[15]

On June 3, 1935, this Court ruled broadly that all three aspects of the second phase of the annual work campaign: (1) the posting of the challenges on the claims, (2) the institution of contest proceedings, and (3) the rendering of decisions therein—"went beyond the authority conferred by law." *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, 647.

Interior's Response to the Prior Decisions of This Court

The Petition states (p. 2) that, after *Virginia-Colorado*, the *TOSCO* and *Brown* claims "remained cancelled on the Department's records," but that is not so (except in the sense that the prior papers were not destroyed).[16] En-

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[15] The Petition does not accurately state what happened in this second phase. It gives 1931 as the last date for a "cancellation"; in fact, the Secretary's ruling on the *Brown* claims came on March 10, 1932 (Pl. Ex. 41, R. 1639-41). It states that the claimants in only one of the four actions below carried their cases to the Secretary. In fact, two did: in *Brown* as just noted, and in *Umpleby* (the decision of Assistant Secretary Edwards, *L. Z. Harrison, Joseph B. Umpleby et al.*, A-15072, Nov. 29, 1930, is Exhibit A-1 to the complaint, R. 14 in No. 9582). The Petition implies that the *TOSCO* claims were "cancelled" entirely; in fact, as the Government conceded below (appendix to post-trial brief to the district court, pp. 74-87), less than 50% of the interests therein were cancelled before the entire annual work campaign was suspended.

[16] After *Virginia-Colorado*, Land Office officials in Washington called in from the local land offices all of the official files of the annual work contests (Pl. Ex. 71, R. 1741-42; Pl. Ex. 72, R. 1743-45; Pl. Ex. 74, R. 1748-53), and they were placed in storage in the Federal Records Center in Alexandria. They were thereafter resorted to only in processing subsequent patent applications, since

larging on this groundless assertion, the Petition then asserts (pp. 11, 12) that the Land Office subsequently relied upon these cancellations, but that is not so, as the evidence makes unmistakably clear and as the Government itself conceded in the district court. The record is replete with documents showing unequivocally that the Land Office did not rely upon the annual work decisions, but instead regarded them as void. The evidence submitted at trial comprises more than 7,000 pages, and cannot be fully stated here.[17] A few examples should suffice; there is no contrary evidence whatsoever, and the evidence consists entirely of Land Office records, save for the depositions of two Land Office employees.

First, just as after this Court's decision in *Krushnic* the Department had recognized that, in fulfillment of its obligation to administer the public lands in conformity with law, its prior decisions contrary to the decision could not stand, likewise after the *Virginia-Colorado* decision

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the reports therein of field investigations often had useful information as to discovery, the performance of patent work, etc. *E.g.*, Pl. Ex. 126, R. 1900; Pl. Ex. 127, R. 1901; Pl. Ex. 309, R. 871-74, 4914, 4933-34. Of course these files contained the annual work decisions, but Land Office personnel who checked these files were specifically instructed "if the charge of failure to do assessment work was the only charge, it was to be ignored, and had been ignored" (Pl. Ex. 309, R. 871-74, 4919).

[17] The Petition plainly errs in describing this evidence as "fragmentary" (p. 9, n. 1). The reason for the error may be that the reference was to the *Union Oil* decision of 1964, not to the evidence presented at trial in 1966. Of course, the evidence in *Union Oil* was fragmentary; there was no notice of charges, and no opportunity for a hearing, and thus no evidence. (Ironically, although *Union Oil* denied the patent applicants' motion for an evidentiary hearing, see App. 54a, it bolstered its rulings against them on the ground that they had made "no clear showing" as to certain facts. App. 72a.)

the Department acted to deprive of effect the assessment work cases previously decided in the renewed campaign. In a published decision three weeks after *Virginia-Colorado,* Interior announced that the annual work decisions were "without authority of law and void" and thus they all were deprived of any effect. *The Shale Oil Company,* 55 I.D. 287 (June 24, 1935) (Pl. Ex. 70, R. 1737-40). That was followed by directions to the local Land Offices to close out assessment work cases then pending there (Pl. Ex. 71, R. 1741-42; Pl. Ex. 72, R. 1743-45; Pl. Ex. 74, R. 1748-53; Pl. Ex. 82, R. 1792; Pl. Ex. 85, R. 1811; Pl. Ex. 87, R. 1813; Pl. Ex. 89, R. 1815; and Pl. Ex. 84, R. 1810), and by the disposition on the authority of the *Shale Oil* decision of appeals then pending either before the Commissioner of the General Land Office or the Secretary (*e.g.,* Pl. Ex. 76, R. 1754-55; Pl. Ex. 77, R. 1756-58; Pl. Ex. 78, R. 1759-73; Pl. Ex. 45, R. 1655-64; Pl. Ex. 79, R. 1774-77; and Pl. Ex. 80, R. 1778-82).

The Department action was shown also in response to inquiries as to the status of oil shale claims supposedly invalidated for failure to perform assessment work. In reply it was uniformly and consistently stated that the Department had invalidated such decisions, as, for example, the Commissioner wrote to an oil shale claimant on July 17, 1935, "any declaration by [the Land Office] that an oil shale placer claim is null and void based solely on a charge that the claimant failed to perform annual assessment work or resume work on the claim is void and does not affect the right of the owner of the claim to maintain his possession thereof under the mining laws" (Pl. Ex. 136-A, R. 1917). The point was also explicitly made that no further administrative action was needed to undo the

prior decisions. For example, the Commissioner wrote to a claimant in 1936:

> "This office considers that it would be unnecessary to revoke its previous decision holding the Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the title arising from the location of the claims" (Pl. Ex. 180, R. 2024-25).

A third example is a letter from Acting Secretary West on October 31, 1935, to the Secretary of the Navy that the assessment work decision in Contest 12039 involving the very Oyler claims in *Brown* was (with many other similar decisions) "without effect and void" and that "the status of the claims so far as this Department is concerned is that they are subsisting claims" (Pl. Ex. 176, R. 2013; see Pl. Ex. 177, R. 2014-19 for a list of the claims).

So, too, in 1939 (and in 1941, and 1943, see Pl. Ex. 191, R. 2049-50; Pl. Ex. 194, R. 2054-55), Secretary Ickes wrote to the Congress, in support of remedial legislation:

> "Conceiving that the Mineral Leasing Act conferred such authority upon him, the Secretary of the Interior challenged in departmental proceedings the validity of thousands of these claims. After full hearings the claims were declared void because of default in assessment work. Appeal was taken from these proceedings and in the cases of *Wilbur* v. *Krushnic,* 280 U.S. 306 (1930) and *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U.S. 639 (1935) the Supreme Court held that the proceedings exceeded the authority of the Secretary and were, therefore, without effect. From these decisions it is apparent that, although the performance of annual assessment work is expressly required by law, there is no statutory authority to enforce that requirement" (Pl. Ex. 6, R. 1526).

In 1946, then Acting Secretary Chapman responded to an inquiry from Senator Myers about a 1931 assessment work decision (the same in all material respects as those here), stating that shortly after *Virginia-Colorado,* "in the case of the *Oil Shale Company* [sic] . . . the Department . . . overruled its action in other cases, including this one" (Pl. Ex. 204, R. 2070). In 1959, the Associate Solicitor for Public Lands, Clarence Bradshaw, a veteran of the field investigations in the assessment work campaign (see Pl. Ex. 283, R. 4581-82) and conversant with the intervening land administration (see Pl. Ex. 306, R. 4715; Pl. Ex. 309, R. 871-74, 4918-19, 4949), rejected in a memorandum to the Denver Regional Solicitor's Office what would a few years later be the *Union Oil* hypothesis:

> "In view of the Supreme Court decisions mentioned, the Department in its decision of June 24, 1935, in the *Shale Oil Company* case (55 I.D. 287) held that in that case the Commissioner's decision was without authority of law and void; recalled and vacated certain cited departmental decisions and the departmental instructions of June 17, 1930 (53 I.D. 131); and overruled 'other departmental decisions in conflict with this decision.' Thus in effect the decision of June 24, 1935, recalled and vacated *all* departmental decisions declaring oil shale placer claims null and void solely for failure of the claim owner to do the assessment work, thus leaving the claims as if they never had been contested" (Pl. Ex. 215, R. 2103-04; emphasis in the original).

The record abounds with many similar statements (Pl. Ex. 175, R. 2011-12; Pl. Ex. 192, R. 2050; Pl. Ex. 195, R. 2056; Pl. Ex. 181, R. 2026; Pl. Ex. 180, R. 2024-25; Pl. Ex. 182, R. 2027-28; Pl. Ex. 193, R. 2052; Pl. Ex. 196, R. 2057; Pl.

Ex. 197-199, R. 2058-62; Pl. Ex. 200, R. 2063; and Pl. Ex. 207, R. 2075-76). In view of the wealth of evidence it is thus hardly surprising that, so far from insisting upon the reliance suggested by the Petition, the Government's post-trial brief to the district court (pp. 59-60) conceded:

> "We do not contend that administration of the land was affected by any particular reliance on the early decisions. In fact, the administrators may not have known of the decisions."

The Petition errs also in asserting (pp. 5, 9, n. 4) that the Land Office "for a time stood ready to reopen cancellations," refering to 74,000 acres of claims which were subsequently patented, as if that "time" was severely limited. As the foregoing examples show, the Department's view was (as early as July 1935) that no reopenings were necessary or appropriate[18] for the annual work decisions were void and in any event had all been rendered ineffective by broad remedial administrative action. Moreover, the 74,000 acres were patented, not soon after *Virginia-Colorado*, but over the next 25 years, as patent applications were filed and processed. The evidence shows that such patents issued in every year from 1949 through 1960 for claims that had been purportedly cancelled for failure to do assessment work and that such claims constituted approximately two-thirds of the total of 768 oil shale claims patented in Colorado on applications filed after the *Shale*

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[18] The only example of administrative action to reopen a final decision in an assessment work contest arose out of an inquiry received by the Department after *Virginia-Colorado* but before promulgation of the *Shale Oil* decision; it was thus treated as a pending case when the *Shale Oil* decision was announced (*Joseph D. Ahearn et al.*, A-16739, Pl. Ex. 69, R. 1735-36; see also Pl. Ex. 67-68, R. 1729-1734).

Oil decision (Pl. Ex. 95, R. 1827-42). The Petition simply misstates the evidence in suggesting that the Department's recognition of the invalidity and ineffectiveness of assessment work contest decisions was confined to "the immediate wake of *Virginia-Colorado*" (p. 15).

The Petition is thus wrong both in its assertion that the Department was responsive to this Court's declaration of the law only briefly, and also in its assertion that the Department had relied in administering the lands upon the supposed validity of the assessment work decisions. In 1963, the Assistant Secretary for Public Land Management, reviewing the entire period, concluded in these terms:

> "[A]ll prior adverse decisions, based on assessment work, were ignored, and many patents issued without any question being raised as to the finality of the *Shale Oil* decision in cancelling all prior decisions which were based on assessment work alone" (Pl. Ex. 211, R. 2093).[19]

There is in short an utter absence of evidence that between the *Shale Oil* decision in 1935 and the *Union Oil* proceedings, referred to below, the Department or anyone else ever acted upon the basis that an oil shale assessment work decision was effective for any purpose.

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[19] This statement appears in a letter from the Assistant Secretary to Sen. Clinton Anderson that was introduced in evidence in the district court pursuant to a stipulation in which counsel for the Government agreed that "the matters referred to in the [letter] fell within his jurisdiction as such Assistant Secretary," and that "He was, at the time, generally familiar with the matters referred to in the [letter]" (Pl. Ex. 211, R. 2088).

The Department's Change of Position

The contrary view was first asserted in a series of decisions by the Colorado Land Office Manager which were affirmed on appeal in April 1964. *Union Oil Company of California,* 71 I.D. 169 (App. 47a-84a). In July 1964 the plaintiffs in *TOSCO* initiated the first of the four cases below. That complaint, which involved oil shale claims none of which were before the Department in *Union Oil,* sought only judicial review of the pre-1935 assessment work decisions, and a judgment declaring those decisions to have been without effect and enjoining the Secretary from asserting their effectiveness. The complaint did not seek a patent (no application had been filed for one), nor did it seek any judgment which in any other respect would have affected the Department's power to challenge the validity of the claims on any other ground. The other three cases below were commenced later; the four were tried together. Unlike *TOSCO* the other three cases below involved claims ruled upon in *Union Oil,* patent applications having been filed. In those three cases the plaintiffs thus also sought judgments setting aside the *Union Oil* decision.

The Issues in the Courts Below

The plaintiffs presented in the district court, and renewed on appeal in support of the decision rendered by the district court, three distinct grounds upon which they were entitled to judicial relief from the pre-1935 assessment work decisions (see App. 28a):

1. The decisions were rendered in excess of the subject matter jurisdiction of the Department and were, in con-

sequence, themselves void. This argument rested upon the decisions of this Court in *Krushnic* and *Virginia-Colorado.* It presented the only issue passed upon by the district court and the court of appeals.

2. The Department, following upon this Court's decisions in *Krushnic* and *Virginia-Colorado,* adopted and thereafter consistently applied a rule, from which it may not now retroactively depart, that the pre-1935 assessment work decisions were themselves null and void and without effect. This point would deprive the pre-1935 decisions of present effect, whether or not the decisions in *Krushnic* and *Virginia-Colorado* are regarded as rulings upon the subject matter jurisdiction of the Department (and, indeed, whether or not *Krushnic* and *Virginia-Colorado* were correctly decided on any basis).

3. Again without regard to whether *Krushnic* and *Virginia-Colorado* were rulings upon jurisdiction, it is clear that at least they were holdings that the Department had committed legal error in purporting to cancel oil shale claims for failure to perform assessment work. The pre-1935 decisions being thus legally erroneous and administrative adjudications of the Department being admittedly subject to judicial review and reversal, the plaintiffs are entitled to judicial review and relief from the pre-1935 decisions affecting the claims in suit.

The plaintiffs advanced two further grounds below of less general applicability.

4. The pre-1935 decisions touching the claims in *TOSCO* were confessedly subject to procedural deficiencies in that the then owners of substantial interests in each of the

claims were never joined as parties to the assessment work proceedings. As to those interests, the extent of which was not disputed, the assessment work decisions can have no consequence on any conceivable theory, as the Department's Supplemental Decision in *Union Oil*, 72 I.D. 313, had made manifest as to other claims.

5. As to the four Oyler claims in *Brown* below (and the claims in the other two cases below), the failure of the Department in *Union Oil* to accord notice and an opportunity to be heard as to whether what was in substance the affirmative defense of laches and estoppel, based on events post-1935, could breathe life into the assessment work decisions as the *Union Oil* decision asserted, required that that decision be set aside, whatever the decision on points 1, 2 and 3, *supra*, as to the claims involved.

Reasons Why the Petition Should Be Denied

1. The court of appeals, affirming the district court, rightly construed and applied the prior unanimous decisions of this Court in the *Krushnic* and *Virginia-Colorado* cases to hold that the administrative decisions rendered in the period 1928-1932 were nullities. As the Petition perforce recognizes (p. 7), an administrative decision, no less than the decision of a court, is void if rendered in the absence of subject matter jurisdiction.[20] The

[20] As the Petition also recognizes (*id.*), a defect of process in an administrative proceeding equally deprives the resulting decision of consequence. But it does not, as the Petition inconsistently suggests (p. 7, n. 3), require an application to the Secretary to validate the invalidity. The consequences of defective service

Petition argues, however, that the defect in the assessment work decisions which a unanimous Court noted in *Virginia-Colorado* did not go to the Department's jurisdiction, but only to the manner of exercise of its power. This argument ignores the setting of the *Virginia-Colorado* decision, which shows, as the language of Chief Justice Hughes' decision itself strongly suggests, that it was presented to this Court as a question of jurisdiction.

To appraise accurately the significance of *Virginia-Colorado*, one must consider the earlier, and likewise unanimous, decision of this Court in *Wilbur* v. *Krushnic*, 280 U.S. 306 (1930), which the Petition all but ignores. In that decision the Court rejected as "contrary to [the] explicit terms" of the Mineral Leasing Act Interior's contention that a failure to perform annual assessment *ipso facto* invalidated a claim as against the United States, 280 U.S. at 319. The opinion noted that prior to the passage of the Mineral Leasing Act "annual performance of labor was not necessary to preserve the possessory right . . . as against the United States." Directly contrary to the suggestion (Petition, p. 16) that this Court was not apprised of authorities holding that where the Department had a competing interest in fact (as it did, under the Mineral Leasing Act, as a prospective lessor of oil shale lands), the Government could assert a right of relocation upon default

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are not of merely academic interest, for, although the Petition does not note it, and does not present the question, the Secretary conceded in his post-trial brief to the district court that substantial interests (from 7/16 to 13/16) in every one of the 75 mining claims involved in *TOSCO* were wholly unaffected by the assessment work decisions for this very reason, without regard to any decision in this Court on the question which the Petition does raise.

in assessment work, this line of authority was urged upon this Court in *Krushnic* by the Secretary.[21]

While the Petition ignores the *Krushnic* decision, the Secretary at the time was well aware that it had merely "left the possibility (though no certainty)"[22] that if the Department challenge intervened before the resumption of assessment work a different result might follow. Accordingly, the assessment work campaign was resumed in slightly altered form "in order to test out the extent of authority (if any) left to us by the Supreme Court decision [in *Krushnic*]."[23] It was in the resumed campaign that the assessment work decisions against the claims in suit were rendered. And it was in the course of the same resumed campaign that the administrative decision, *Virginia-Colorado Development Corporation,* 53 I.D. 666, was rendered which became "the second test case in the courts" which the Secretary's 1930 Annual Report had said "may be expected" (Pl. Ex. 15, R. 1568). When the claimants in that case sought judicial review the Secretary on April 1, 1933, suspended all action in then pending oil shale contests "awaiting court decision on jurisdiction of the Department to challenge the validity of oil-shale locations for failure to perform annual labor thereon" (Pl. Ex. 44, R. 1653). It would be difficult, indeed, to propose an analysis

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[21] See 280 U.S. at 308 summarizing the argument of counsel. The *Krushnic* decision was obviously a rejection of this line of authority. The Department itself so understood, for one of these supposedly "well-established" authorities was overruled following the *Krushnic* decision. *Standard Shales Prod. Co. (On Rehearing),* 53 I.D. 42 (1930).

[22] Annual Report of the Secretary for 1930 (Pl. Ex. 15, R. 1568).

[23] Testimony of Secretary Wilbur before the Senate Committee on Public Lands, February 12, 1931 (Pl. Ex. 47, R. 1667).

less apt than the suggestion advanced by the Petition that the *Virginia-Colorado* case was not avowedly presented as a test of jurisdiction.

The language employed by the Court in *Virginia-Colorado* was appropriate as a vehicle for providing an answer to the question thus put. The Court did not, as the Petition suggests, confine its holding to the point that the "cancellations 'went beyond the authority conferred by law'" (Petition, p. 7). What it said was that not only the decision but also "the Department's challenge [and] its adverse proceedings . . . went beyond the authority conferred by law," 295 U.S. at 646-47, or, in the words of the Petition, that there was "the absence of power in the agency to consider the question put" (p. 7).

This reading of the decisions is not only the plain meaning of the words employed. It is consistent with the statutory provision which confers exclusive jurisdiction on the courts (and hence deprives the Secretary of subject matter jurisdiction) to adjudicate rival mining claims to the same ground (30 U.S.C. 30), for it is to such competing claims alone that assessment work has significance.[24] The special statutory treatment of rival mining claims serves to distinguish questions such as the performance of assessment work, which relate only to that subject, from the Secretary's general authority to pass on the validity of mining claims and the decisions of this Court on that different subject to which the Petition refers. This Court in *West* v. *Standard Oil Co.*, 278 U.S. 200 (1929), provided the touchstone: the Secretary has power to make all

[24] That this is the focus of assessment work is recognized explicitly by the Department's regulations. 43 C.F.R. § 3420.4 (quoted *supra*, p. 4).

necessary determinations of fact and law "essential to the performance of the duty specifically imposed" (*id.* at 219).[25] By express statutory enactment the Secretary has no duty to adjudicate rival claims, and assessment work is relevant to no other issue.

2. The Petition has attempted to portray a parade of horribles with dire "implications for the public domain" to give a factitious significance to the issues dealt with by the courts below. This, like the suggestion that the mining claims are barred by laches (see pp. 30-32, *infra*), can be sustained only by ignoring the extensive factual record which is wholly adverse to the Petition's speculations. The administrative practice of the Department following the final defeat of the assessment work campaign in 1935 was noted at some length by the district court (App. 40a-43a) and briefly by the court of appeals (App. 9a). The evidence of this practice "as demonstrated by the record in these cases" (App. 9a) is altogether different from the impression, which the Petition attempts to convey, that it is "fragmentary and inconclusive" (Pet. 9, n. 4). Significantly, the Petition refers for this proposition, not to the record in these cases, but only to the opinion in *Union Oil Company,* where understandably enough the record was scanty, for the Department in that case had failed to give notice to the claim owners who were parties that the matter was at issue or to afford them an opportunity to present evidence on the question in any system-

[25] The Government urged this same analysis, on the authority of *West,* in *Krushnic* in support of its contrary conclusion. Brief for Pet., p. 16. On the basis upon which the case was presented, the Court's conclusion that the Secretary had no duty would lead directly to a holding that he lacked the power.

atic way.[26] Thus the decision refers to six letters (App. 69a, note 30) as if that represented the sum of the matter, whereas the evidence below comprises some 7000 pages, a large part of which is directed to this point.[27]

Far from constituting either a "fragmentary" or "inconclusive" picture, the evidence shows that from the time of the Department's formal announcement of its acquiescence in and implementation of this Court's decisions in its own decision in *The Shale Oil Company,* 55 I.D. 287 (1935), down to the administrative decisions in February 1962, which were affirmed in *Union Oil* in 1964, the Department openly, publicly and consistently treated the assessment work decisions as nullities in any and every context in which the issue of their effectiveness could arise. Thus, there is nothing which has been said by the courts below which creates any "implications for the public domain" (see Petition, p. 17) that are in the slightest degree at variance with the policies for the public domain announced and implemented by a series of Secretaries beginning with Secretary Ickes, whose devotion to the legitimate interests of the public is open to no question. The facts in the voluminous record, in short, conclusively rebut the suggestion in the Petition that Department compliance with

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[26] The *Union Oil* decision denied motions to set the matter for hearing (the decisions of the Land Office Manager having been rendered without any notice or hearing) on the ground that hearings had been held, or had been available, in the old assessment work decisions themselves (App. 48a, 52a-55a). On the issues upon which the decision on the merits was rested, a hearing prior to 1935 would have been immaterial, for the laches point and the related "doctrine of finality of administrative action" (see App. 58a *et seq.*) depend entirely upon facts subsequent to 1935.

[27] Of the 317 exhibits offered by the plaintiffs in *TOSCO,* substantially more than half are directed to this issue.

the rule of law announced in *Virginia-Colorado* and foreshadowed in *Krushnic* was a sometime or briefly continued thing or the further suggestion that to permit the decision below to stand would create in the administration of the public lands altogether novel problems. The charge of novelty would lie only if the Department were now allowed to give conclusive effect to decisions admittedly erroneous when rendered, which in 1935 it deprived of all effect, and which from 1935 until this litigation it treated as nullities.

That there may be several interests in particular land within a mining claim in the public domain under administration by the Department arises from the fact that a variety of public land statutes provide for differing interests until a mining claim is patented, and none of the claims in suit has been patented.[28] That circumstance does not depend upon whether the Land Office declares a mining claim null and void or whether, having done so, the Land Office specifically vacates that declaration. For example, Under Secretary West wrote in 1935, after noting that an assessment work decision against certain oil shale claims was "without authority of law and void," that since no patent application was pending,

> [T]he matter will stand as if no adverse proceedings had been brought . . . . If and when application for

[28] As the court of appeals noted, "the land status in this area has become somewhat complicated . . . but these complications are not essentially different than in any area where there are a considerable number of mining claims. This is one of the Secretary's basic problems in administering lands where the general mining laws are applicable . . . . This involved land status is not the doing of the mining claimants as the Department has proceeded to receive these other [non-mining] entries and to process them regardless of the unpatented claims. It is not a question of laches on either side" (App. 15a).

patent shall be filed for these placer claims such application will be considered on its merits.

In the meantime, so far as the records of the Land Department are concerned, the lands involved appear and are regarded as vacant and unappropriated public lands" (Pl. Ex. 69, R. 1735-36).

The problems of differing uses of these public lands, which were present before the assessment work campaign and posed no great difficulties then, have not actually proven to be of substantial difficulty since then. As noted above, from 1935 through 1960, the Department processed patent applications for oil shale claims, many of which had been attacked in the assessment work campaign, and valid ones proceeded to patent. Second, the Department established, and apparently found quite workable, a procedure whereby it has regulated grazing on oil shale claims until patent issues. See, *e.g.*, Pl. Ex. 63, R. 1715-22; Pl. Ex. 203, R. 2067-69; Pl. Ex. 208, R. 2077; Pl. Ex. 209, R. 2078-82; Pl. Ex. 210, R. 2083-86. See also, *United States* v. *Etcheverry,* 230 F.2d 193 (10th Cir. 1956). At times the Department turned to Congress for assistance in accommodating the differing interests. It supported the Multiple Mineral Development Act of 1954, 68 Stat. 708, 30 U.S.C. 521-531, which facilitates the ready determination of the respective rights of federal mineral lessees and oil shale mining claimants. See Sen. Rep. No. 1610, 83rd Cong., 2d Sess. Similarly, the Department supported the Act of July 20, 1956, 70 Stat. 592, 30 U.S.C. 122, which simplified obtaining patent for the minerals by an oil shale claimant where a patent for the surface had previously been issued and remained outstanding. See Sen. Rep. No. 2524 and H. Rep. No. 2198, 84th Cong., 2d Sess. If, as the Petition asserts (p. 15), "it is essential that there be some stability to the status of the public domain . . . ," it was the

Union Oil decision, not the decisions of the courts below, which upset this established pattern of accommodation of interests.

3. The "Secretary's invocation of laches to bar the present claims" (Petition, p. 13) provides no basis for material distinction between the present case and *Virginia-Colorado,* just as it provides no basis to question the decisions below. It is of course true that judicial proceedings in *Virginia-Colorado* followed upon the administrative decision more quickly than has been true here, but if that greater interval of time is to be given significance the laches defense must be proved, not simply "invoked."[29] That choice of words in the Petition was not inadvertent, for while the Secretary invoked laches in the district court, by pleading it as an affirmative defense, it is conceded that he did not prove it.[30] The answer to the *TOSCO* complaint in the district court asserted that ". . . the United States, relying on the established invalidity of the claims . . . administered the property as being free and

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[29] "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello* v. *United States,* 365 U.S. 265, 282 (1961); see also *Gutierrez* v. *Waterman Steamship Corp.,* 373 U.S. 206, 215 (1963); *Northern Pac. Ry.* v. *Boyd,* 228 U.S. 482, 509 (1913).

[30] In its post-trial brief to the district court (pp. 59-60), counsel for the Secretary stated: "We do not contend that administration of the lands was affected by any particular reliance on the earlier decisions. In fact, the administrators may not have known of the decisions." How adherence to decisions of which the relevant administrators may have been altogether unaware can be essential to the "certainty of [administrative] adjudications" (Petition, p. 10) which, in turn, is "particularly essential in the context of transactions affecting land" (*id.* at 11), the Petition does not explain. Until the Department's *volte-face* in 1964 in *Union Oil,* there was no uncertainty in the matter whatever.

clear of plaintiffs' claims . . . " (R. 35), in terms quite similar to the assertions of the Petition. However, the Secretary in answer to interrogatories addressed to that language in the answer admitted that he "does not know" whether the United States had in fact so administered the lands and, indeed, whether any party had ever entered a transaction "in reliance upon the invalidity of the claims in suit" (Pl. Ex. 313, R. 945, 5180). The answers to interrogatories established beyond question that there is not one whit of evidence in the Department's possession, or in existence to its knowledge, as to any reliance by anyone at any time in any respect on the supposed validity of any of the assessment work decisions (Pl. Ex. 313, R. 945, 5176-80; Pl. Ex. 314, R. 945, 5185-88). This, of course, is simply another perspective upon the Department's long-continued practice of treating the assessment work decisions as nullities and "thus leaving the claims as if they never had been contested" (Pl. Ex. 215, R. 2104).

The *Union Oil* decision, to which presumably the Petition refers in its reference to the invocation of laches, is in any event of no consequence upon the litigation initiated by the plaintiffs in *TOSCO,* for the claims involved in that case were not before the Department in *Union Oil.*[31] The litigation in *TOSCO* is both in its procedural posture and in the substantive issues raised by the complaint, a parallel

[31] The claims in *TOSCO* have never been the subject of a patent application. The Petition (p. 6) is flatly in error in asserting that the plaintiffs in that case "sought a declaratory judgment . . . that the Secretary was required to issue patents on proper application for the ostensibly cancelled claims" and flatly in error in asserting (*id.*) that "the district court found that patents should issue." The plaintiffs sought only a declaration that the old assessment work decisions were invalid and an injunction to restrain reliance upon them (R. 12), and the judgment of the district court was similarly confined (R. 439-442).

to the *Virginia-Colorado* case itself. Even if *Virginia-Colorado* were held to have found the assessment work decisions merely wrong in the exercise of power possessed, that error would be beyond the familiar power of a court to correct it only if suit for judicial review is barred by some affirmative defense. The voluminous record below is devoid of evidence sustaining any such defense, and, had the district court felt it necessary to reach the issue, the plaintiffs would have been entitled to judgment on this alternative ground.[32]

4. The issue which the Petition tenders would neither dispose of the four cases below (assuming *arguendo* that the Petition intends, and is effective, to present all four) nor would it control the broader question of the ultimate validity of the underlying mining claims. Nor, because of decisive procedural defects in both the pre-1935 assessment work cases and in *Union Oil* itself, would any decision which this Court might reach save the burden and expense of further proceedings to which the Petition points (see, *e.g.*, p. 12). Beyond the usual reasons which would weigh against a reconsideration by the Court of its two prior decisions construing the relevant statutes there is, therefore, the further fact that no important issue would be resolved by doing so.[33]

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[32] *Brown* differs in its procedural posture from *TOSCO* in the respect that in *Brown* an application for patent to the claims had been rejected in *Union Oil* on the assessment work ground. The complaint in *Brown* thus sought both judicial review of the *Union Oil* decision and also direct review in the district court of the pre-1935 assessment work decision rendered against the claims (R. 1-11 in No. 9584). In its latter aspect, *Brown* presents the same issues raised in *TOSCO*.

[33] There is no suggestion in the Petition that the question passed on in *Krushnic* and *Virginia-Colorado* is broadly relevant to any

The prior assessment work decisions applicable to the 75 mining claims in *TOSCO* were conceded by counsel for the Government in a post-trial brief to the district court (pp. 74-87 of the appendix thereto) to have been seriously deficient under the standards enunciated recently by the Department itself (*Union Oil Company of California, Supplemental Decision*, 72 I.D. 313) in respect of obtaining personal jurisdiction over the then owners of the claims. As a consequence of those deficiencies, the prior decisions are admittedly ineffective as to substantial fractional interests (from 7/16 to 13/16) in every such claim, irrespective of the merits or validity of the contest decisions themselves. If the validity of the substantial remaining interests is to be determined, further administrative proceedings on other issues are required whatever decision this Court might reach on the question tendered by the Petition.[34]

The claims in the *Brown* case and in the other two cases below were passed upon in *Union Oil Company*, but for the reasons noted above (pp. 26-27) that decision cannot

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significant number of mining claims of other kinds. Nor is there any basis for expecting that it would be, in light of the circumstances that the issues considered in those cases are material only to mining claims which were located prior to 1920 for Leasing Act minerals and which have never been patented.

[34] Similar procedural deficiencies marked the assessment work proceedings involving the claims that *were* before the Department in *Union Oil*. In a supplemental decision in that case the Department ruled that, of the 257 claims involved, personal service on the claim owners in the assessment work proceedings was ineffective as to 218: wholly so as to 117 and partly so as to a further 101. *Union Oil Company of California, Supplemental Decision*, 72 I.D. 313. As to those 218 claims, further proceedings are likewise inevitable, regardless of the merits of the assessment work decisions.

stand because of gross procedural deficiencies in its conduct, again regardless of the merits of the assessment work issue.

The Petition does not present the alternative ground for decision upon the merits of the assessment work issue, which the plaintiffs advanced below (see page 21, *supra*), that, even if *arguendo* it is assumed that the decisions in *Krushnic* and *Virginia-Colorado* did not go to the jurisdiction of the Department, it is undisputed that following those cases the Department itself acted, as of course it had power to do (indeed, the Petition insists upon the Secretary's plenary power), to deprive of effect the prior assessment work decisions. Having done that, and having then adhered to the position thus enunciated, the Secretary may not now retroactively alter the character and effect of the action of his predecessors, upon familiar principles. See, *e.g.*, *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272 (1966); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956); *Lane* v. *Hoglund*, 244 U.S. 174 (1917); *Logan* v. *Davis*, 233 U.S. 613 (1914).

Finally, a decision by this Court would fall still farther short of resolving the ultimate validity of the claims in suit. As the court of appeals noted explicitly, "It must be borne in mind that these proceedings . . . are concerned only with the annual assessment work problem, and not with the many other hurdles which must be crossed by a claimant on the way to patent" (App. 14a). The judgments in the district court, which the court of appeals affirmed, offer no bar to the assertion by the Department of any ground which can be established, including abandonment, lack of discovery, fraud in the location, and the other familiar bases upon which a mining claim can be

challenged. No such questions were presented to the lower courts; the only matter that has been decided is that the assessment work decisions do not afford a proper basis for holding that the claims are invalid. As the district court noted, "there has been no contention that the plaintiffs have abandoned their claims and there is a dearth of evidence to establish acquiescence, express or implied, by plaintiffs in any assumption of jurisdiction by the Department" (App. 46a).[35] The judgment in *TOSCO* goes no further than to declare the assessment work decisions void and to enjoin the Secretary from asserting them against the claims (R. 439-42). The judgment in *Brown*, in addition, set aside the decision in *Union Oil* and simply remanded the patent application to the Secretary "for such further proceedings thereon as may be appropriate" (R. 193-97 in No. 9584).

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

July, 1969

Respectfully submitted,

FOWLER HAMILTON
RICHARD W. HULBERT
DONALD L. MORGAN

[35] The repeated allegations of abandonment in the Petition (*e.g.*, at p. 2, "thousands of oil shale claims were abandoned") have no basis whatsoever in the record. Similarly of no bearing on any issue actually raised in the litigation is the matter of the "reassertion" of the claims (Petition, p. 2). It is undisputed that the owner of a mining claim never need "assert" it by filing a patent application, so that a "delay" in doing so is immaterial.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 221

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO THE BRIEF IN OPPOSITION

1. The judgments of the United States Court of Appeals for the Tenth Circuit in the appeals taken to that court by the United States against respondents Umpleby, *et al.*, Napier, *et al.*, and Brown, *et al.*, are set out in Appendices A, B, and C, respectively, *infra*. They were omitted by inadvertence from the petition. All three, together with the judgment in *United States v. The Oil Shale Corporation, et al.*, were certified to this Court as part of the original record now on file with the Clerk. All four appeals were treated as one in the opinion of the court below, and the body of the petition makes plain that our intention was to seek review of that decision—that is, of all four judg-

502-474—69

ments—although only one judgment was reproduced. There is indeed no basis on which the government could or would have selected only one judgment for review. In all these circumstances, we believe it is sufficiently clear that the government sought review of all the judgments concerned within the time permitted by statute, 28 U.S.C. 2101(c), despite its failure fully to comply with this Court's rules. We regret, however, both our error and any inconvenience it may have caused.

2. Respondents The Oil Shale Corporation *et al.* and Brown *et al.* correctly note that the only issues before this Court are whether its prior opinion in *Ickes* v. *Development Corp.* (*Virginia-Colorado*), 295 U.S. 639, necessarily forbids the Secretary to rely upon his prior cancellation of the present claims and, if so, whether that decision should be reexamined. Whether, absent such compulsion, the history of administrative action after the *Virginia-Colorado* decision forecloses the Secretary from now treating the cancellations as other than void is a separate issue, inappropriate for decision at this time. If this Court should grant certiorari and decide the issue presented in the government's favor, however, we believe we would then be entitled to assert that the questions, how extensive had been the prior administrative acquiescence in *Virginia-Colorado,* and what was its effect on the Secretary's present ability to rely on the cancellations, are matters which ought first to be decided by the Secretary himself and that, he having done so, the appropriate record on which to assess his judgment is the

record made before him, not the record which was sought to be made in district court. *Cf. United States v. Carlo Bianchi & Co.*, 373 U.S. 709.

Although the issues before the Court are thus limited and will not terminate this litigation however resolved, they are nonetheless of major significance for the disposition and rational exploitation of this important national resource. Here, as would not generally be true, there is a massive body of claims located in one area, pertaining to one mineral, and known to have been almost entirely cancelled in the proceedings that led to *Virginia-Colorado*. After more than twenty-five years had passed and less than two percent of the claims had been reduced to patent (74,000 out of over 4,000,000 acres embraced by the old claims) it became imperative to seek new means of development. Obviously, the task of clearing out the old claims to prepare for the future will be considerably aided if the Secretary is able to attach some significance to the history of cancellation and subsequent neglect.[1] Under the holding of the court below, he cannot.

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[1] Again, we do not contend that this Court properly could pass at this time on the Secretary's conclusion in the cases before him that laches now barred the claimants seeking patent. In seeking review, and ultimately reversal, of the court below, we only point out that its conclusion automatically forecloses any laches argument, yet the long period of neglect which has in fact ensued as to virtually all the cancelled oil shale claims is plainly a factor distinguishing them from those involved in *Virginia-Colorado*. If, but only if, the argument is available to the Secretary, the burden could be put on any claimant to show actual reliance on the Secretary's former administrative interpretation of *Virginia-Colorado* or other good cause for the period of neglect.

3. Similarly, respondents The Oil Shale Corporation, *et al.* and Brown, *et al.*, correctly observe that the government does not seek reconsideration of *Wilbur* v. *Krushnic*, 280 U.S. 306, a case on which the *Virginia-Colorado* court heavily relied. But in *Wilbur*, the government had taken no specific steps to assert its interest in the claims it cancelled for failure to do assessment work; it relied purely and simply on that failure as working a forfeiture of the claims. In this respect, *Wilbur* is like the other cases relied upon by this Court in *Virginia-Colorado* for the proposition that the government lacked interest in the performance of assessment work[2]—it was a case in

[2] Although this proposition is embodied in the Department's regulations, 43 C.F.R. 3420.4, prior to *Virginia-Colorado* it appeared there in a limiting context which makes inappropriate the broad meaning respondents seek to attach to it. It appeared in the regulations dealing with "Procedure to Obtain Patent to Mineral Lands," 37 L.D. 763, as part of an explanation of the steps required to obtain patent. One of the requirements was that the applicant show that he had a "possessory right to the premises * * * in virtue of a compliance * * * [with state and local law] and with the mining laws of Congress." 37 L.D. at 766. In stating thereafter that the annual assessment work is "solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts," 37 L.D. 769, the regulation sought to assure the applicant for patent that even if he had not done assessment work for one or more years prior to his application, his possessory right under the mining laws of Congress was not automatically forfeit; another claimant must have filed a claim during the period of lapse in order to divest him. In so stating, it in no way indicated that the government itself could not initiate contest proceedings, as it did here, when the assessment work was not done, private top-filing was no longer possible, and the land was needed for a public purpose.

which the government's interest was purely abstract. In *Virginia-Colorado,* and in the cancellations here, the government had taken specific steps (such as posting the property) to assert its interest with respect to the claims—acting as if it were a private prospector "top filing" over a claim on which assessment work had not been done—because under the 1920 statute private top filing was no longer possible and it was deemed important that the land be freed of the old claims.

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
PETER L. STRAUSS,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
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Attorneys.

SEPTEMBER 1969.

APPENDIX A

JANUARY TERM, FEBRUARY 4TH, 1969

Before Honorable Orie L. Phillips, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges

Appeal from the United States District Court for the District of Colorado

9582

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

JOSEPH B. UMPLEBY AND WASATCH DEVELOPMENT CO., APPELLEES

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER,
Clerk.

By GLADYS E. HOBBS,
Deputy Clerk.

APPENDIX B

JANUARY TERM, FEBRUARY 4TH, 1969

Before Honorable Orie L. Phillips, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges

Appeal from the United States District Court for the District of Colorado

9583

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

BARNETTE T. NAPIER, GRACE A. SAVAGE, JOAN L. SAVAGE, MAUDE B. FARNUM, ST. CLAIR NAPIER CATLIN, WILLIAM H. FARNUM, JR., JOHN R. FARNUM, JOHN W. SAVAGE AND NEIL S. MINCER, APPELLEES

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER,
Clerk.

By GLADYS E. HOBBS,
Deputy Clerk.

APPENDIX C

JANUARY TERM, FEBRUARY 4TH, 1969

Before Honorable Orie L. Phillips, Honorable Delmas C. Hill and Honorable Oliver Seth

Appeal from the United States District Court for the District of Colorado

9584

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

PENELOPE CHASE BROWN, INDIVIDUALLY AND AS TRUSTEE, AND THE OIL SHALE CORPORATION, APPELLEE

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER, *Clerk.*
By Gladys E. Hobbs,
Deputy Clerk.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	4
The legislative setting of the assessment work controversy	5
The oil shale claims	10
Recent development	19
Summary of argument	22
Argument	28
I. The Secretary had subject-matter jurisdiction over the cancelled claims, and therefore is not forbidden from giving effect to cancellations which became final prior to this Court's decision in *Ickes* v. *Virginia-Colorado Development Corp.*	28
A. The Secretary has subject-matter jurisdiction over claims to possessory rights over lands as to which title remains in the federal government	29
B. This Court's decision in *Virginia-Colorado* did not rest on subject-matter jurisdiction, or purport to decide that the thousands of decisions the Secretary had made were of no effect even if final	38
C. A conclusion now that the Secretary's actions in the 1930's were void and without any recognizable effect would have untoward consequences for the public domain	41

371-067—69——1

Argument—Continued
II. The government is entitled to withdraw from location lands which it requires for public purposes and upon which the assessment work required by statute is not being done ..... Page 46
A. Contrary to the Court's conclusion in *Virginia-Colorado*, and as had been shown in the government's *Krushnic* brief, it was established law that the government could invalidate mining locations by withdrawing to a public use land subject to such locations if the required assessment work was not being done 48
B. The background and legislative history of the Mineral Leasing Act of 1920 make clear that Congress believed the maintenance-of-claim provision of the statute would require diligent working of claims 57
1. The legislative materials 58
2. The factor of choice 62
Conclusion 65

CITATIONS

Cases:

Avco Corp. v. *Aero Lodge 735*, 390 U.S. 557 40
Best v. *Humboldt Mining Co.*, 371 U.S. 334 ..... 23, 30, 31, 32, 33, 36, 42, 45, 49, 56
Bishop of Nesqually v. *Gibbon*, 158 U.S. 155 30
Black v. *Elkhorn Mining Co.*, 163 U.S. 445 54
Boesche v. *Udall*, 373 U.S. 472 42
Butte, A. & P. Ry. v. *United States*, 290 U.S. 127 36
Callanan Road Co. v. *United States*, 345 U.S. 507 28
Cameron v. *United States*, 252 U.S. 450 ..... 23, 28, 30, 36, 37, 54
Chicot County Drainage District v. *Baxter State Bank*, 308 U.S. 371 ..... 40, 41
Clipper Mining Co. v. *Eli Mining and Land Co.*, 194 U.S. 220 37
Cole v. *Ralph*, 252 U.S. 286 54
Consolidated Mutual Oil Co. v. *United States*, 245 Fed. 521 8

Cases—Continued Page
Foltz v. *St. Louis & S.F. Ry. Co.*, 60 Fed. 316 40
Frisbie v. *Whitney*, 9 Wall. 187 52
Gabbs Exploration Company v. *Udall*, 315 F. 2d 37, certiorari denied, 375 U.S. 822 ..... 13, 37
Gwillim v. *Donnellan*, 115 U.S. 45 53
Hodgson v. *Midwest Oil Co.*, 17 F. 2d 71 ..... 33, 56
Ickes v. *Virginia-Colorado Development Corp.*, 295 U.S. 639 ..... 2, 16, 17, 22, 23, 24, 28, 29, 34, 38, 39, 40, 41, 45, 46, 47, 48, 56, 57, 63, 64, 65
Michigan Land and Lumber Co. v. *Rust*, 168 U.S. 589 .. 30
Payne v. *Central Pac. Ry. Co.*, 255 U.S. 228 35
Riverside Oil Co. v. *Hitchcock*, 190 U.S. 316 30
Russian-American Packing Co. v. *United States*, 99 U.S. 570 52
Shiver v. *United States*, 159 U.S. 491 52
Swift & Co. v. *United States*, 276 U.S. 311 36
Tehan v. *Shott*, 382 U.S. 406 41
Union Oil Co. v. *Smith*, 249 U.S. 337 54
United States v. *California*, 332 U.S. 19 64
United States v. *Midwest Oil Co.*, 236 U.S. 459 8
United States v. *San Francisco*, 310 U.S. 16 64
United States v. *Schurz*, 102 U.S. 378 29
United States v. *Williams*, 341 U.S. 58 35
West v. *Standard Oil Co.*, 278 U.S. 200 35
Work v. *Braffet*, 276 U.S. 560 35
Wilbur v. *Krushnic*, 280 U.S. 306 ..... 14, 15, 23, 25, 33, 34, 35, 48, 53, 56, 57
Yosemite Valley Case, The, 15 Wall. 77 52
Interior Decisions:
Arid Land, etc., 32 L.D. 387 ..... 37, 52
Cronberg et al. v. *Hazlett*, 51 L.D. 101 55
Freeman v. *Summers*, 52 L.D. 201 18
E. C. Kinney, 44 L.D. 580 ..... 33, 37, 52
Emil L. Krushnic, 52 L.D. 295 ..... 14, 56
Emil L. Krushnic, On Reconsideration, 53 I.D. 45 14
Federal Shale Oil Co., The, 53 I.D. 213 ..... 13, 15, 37, 44
Interstate Oil Corp., et al., 50 L.D. 262 ..... 33, 55, 62
Navajo Indian Reservation, 30 L.D. 515 ..... 37, 52, 55
Nielson v. *Champagne Min. & Mill. Co.*, 29 L.D. 491 .. 56

Interior Decisions—Continued Page
Shale Oil Company, The, 55 I.D. 287 17
Standard Shales Prod. Co., 52 L.D. 522 ..... 33, 56
Standard Shales Prod. Co., 53 I.D. 42 14
Union Oil Co. of California, 71 I.D. 169 ..... 5, 22
Union Oil Co. of California, 72 I.D. 313 ..... 5, 29
United States v. *Ruddock, et al.*, 52 L.D. 313 56
Wolenberg, Re 29 L.D. 302 56
Yosemite National Park, 25 L.D. 48 52
Statutes:
Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 142 8
General Mining Act of 1872, 17 Stat. 91 ..... 2, 5, 50
30 U.S.C. 22 2
30 U.S.C. 26 2
30 U.S.C. 28 ..... 2, 3, 5, 6
30 U.S.C. 29 ..... 2, 3
Mineral Leasing Act of 1920, 41 Stat. 437, *et seq.*:
41 Stat. 443 63
41 Stat. 445 63
41 Stat. 446 ..... 27, 58, 63
41 Stat. 451 58
30 U.S.C. 181, *et seq* 48
30 U.S.C. 193 ..... 4, 10, 57, 58
30 U.S.C. 228 9
30 U.S.C. 241 9
30 U.S.C. 241(a) 4
Mining Act of 1866, 14 Stat. 86 50
Multiple Mineral Development Act of August 30, 1954, 68 Stat. 708 46
30 U.S.C. 521 46
30 U.S.C. 527 18
Taylor Grazing Act, 43 U.S.C. 315 ..... 19, 43
29 Stat. 526 7
41 Stat. 354 20
Miscellaneous:
Annual Report, Secretary of Interior, 1930 15
Boskey and Braucher, *Jurisdiction and* Collateral Attack, 40 Col. L. Rev. 1006 40
45 Cong. Rec. 8667–8672 61
51 Cong. Rec. 15295–15297 61
51 Cong. Rec. 15424–15425 61

Miscellaneous—Continued Page
52 Cong. Rec. 5154–5155 61
53 Cong. Rec. 1092–1095 61
56 Cong. Rec. 384 59
56 Cong. Rec. 389 59
56 Cong. Rec. 487–488 60
56 Cong. Rec. 563–578 60
56 Cong. Rec. 6995 8
56 Cong. Rec. 7034 60
56 Cong. Rec. 7104 60
58 Cong. Rec. 3886 61
58 Cong. Rec. 4111–4112 62
58 Cong. Rec. 4443–4444 62
58 Cong. Rec. 4577–4584 62
58 Cong. Rec. 4577–4585 9
58 Cong. Rec. 4770–4771 62
Davis, *Administrative Law Treatise*, sec. 18.10 (1958 ed.) 28
Executive Order 5327 ..... 15, 18, 43
Executive Order 6016 ..... 18, 43
H.R. 16136, 63d Cong 61
H.R. 406, 64th Cong 61
H. Rep. No. 668, 63d Cong., 2d Sess. (1914) 8
H. Rep. No. 563, 65th Cong., 2d Sess. (1918, regarding S. 2812) 9, 27, 59, 60
Hearings, H. Subcommittee on Mines and Mining of the Committee on Interior and Insular Affairs, H.R. 8896, 83d Cong., 2d Sess. (1954) 46
1 I.D. 552 52
53 I.D. 127 15
53 I.D. 131 15
1 Lindley, *Mines* (3d ed. 1914) 33, 52, 53
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S. 2812, 65th Cong., 2d Sess 59, 61
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S. Rep. No. 319, 64th Cong., 1st Sess. (1916, regarding H. 406) 9, 61

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 221

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE COPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (App. 434) is reported at 406 F.2d 759. The opinion of the district court (App. 26) is reported at 261 F. Supp. 954. The opinion of the Secretary of the Interior (App. 352) is reported at 71 I.D. 169.

JURISDICTION

The judgments of the court of appeals were entered on February 4, 1969 (App. 48, 390, 405, 427). On April 26, 1969, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and includ-

ing June 4, 1969, and on May 27 he granted a further extension to June 19, 1969. The petition for a writ of certiorari was filed on June 10, 1969, and granted October 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a 1935 holding of this Court that the Secretary of the Interior had exceeded his authority in cancelling certain mining claims must be given retrospective effect as to other mining claims previously cancelled on the same ground and which were not reasserted until the 1950's.

2. Whether the 1935 decision of this Court in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, should be overruled or limited to its peculiar facts.

STATUTES AND REGULATIONS INVOLVED

I. The General Mining Act of 1872, 17 Stat. 91, 30 U.S.C. 22, 26, 28, and 29, provides in relevant part:

> § 22. Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase * * *.
>
> § 26. The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States * * * governing their possessory title, shall have the ex-

clusive right of possession and enjoyment [of those locations] * * *.

§ 28. * * * On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. * * * [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. * * *

§ 29 A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim * * * who has * * * complied with the terms of [Sections * * * 26–28 * * * of this title] may file in the proper land office an application for a patent * * *. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the manager a certificate of the United States Chief Cadastral Engineer that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors * * *. If no adverse claim shall have been filed with the Manager of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent * * * and thereafter no objection from third parties to the issuance of a patent shall be

heard, except it be shown that the applicant has failed to comply with the terms of sections * * * 26–28 * * * of this title. * * *

II. The Mineral Leasing Act of 1920, 41 Stat. 445, 30 U.S.C. 241(a) and 193, provides in relevant part:

§ 241(a) The Secretary of the Interior is authorized to lease * * * any deposits of oil shale * * * belonging to the United States * * *. Any person having a valid claim to such minerals under existing laws on January 1, 1919, shall, upon the relinquishment of such claim, be entitled to a lease under the provisions of this section for such area of the land relinquished as shall not exceed the maximum area authorized by this section to be leased to an individual or corporation. * * *

§ 193. The deposits of * * * oil shale * * * herein referred to, in lands valuable for such minerals * * * shall be subject to disposition only in the form and manner provided in sections * * * 241 * * * of this title, except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

STATEMENT

Respondents claim to be the present owners of four groups of claims to oil shale mining locations in Colorado. In the course of an attempt to obtain full ownership rights (patents) over the land and minerals claimed, they sought administratively and in the courts to require the Secretary of the Interior to dis-

regard earlier decisions cancelling those claims. The claims were cancelled in Department proceedings brought in 1928–1932 against these and a large number of other oil shale claims on the ground that the then owners of the claims had failed to meet a statutory obligation to expend $100 annually in labor and improvements on the development of each claim, 30 U.S.C. 28. The first of the present proceedings was not initiated before the Secretary until 1959. In the cases which were brought before him,[1] the Secretary refused to reopen the earlier cancellations, except to the extent it appeared that proper service had not been made in those proceedings. *Union Oil Co. of California,* 71 I.D. 169; 72 I.D. 313. The district court and the court of appeals, however, held that the cancellations based on the assessment work ground had been void from the start, and that the Secretary could give them no effect however tardily the present claims might seem to have been presented (App. 46, 47, 442).

THE LEGISLATIVE SETTING OF THE ASSESSMENT WORK CONTROVERSY

An understanding of the setting in which this issue arises properly begins with consideration of the mining law under which these claims were first made. The General Mining Act of 1872, 17 Stat. 91, opened

[1] Three of the four groups, Umpleby, Napier and Brown, applied to the Secretary for patents in the late 1950's. The fourth group, the Oil Shale Corporation, went directly to district court to seek a declaratory judgment that it would be entitled to processing of its patent claims without regard to any prior cancellation on assessment work grounds. The Secretary's actions were appealed to the same district court, and the four cases were consolidated for trial and appeal.

"all valuable mineral deposits in lands belonging to the United States * * * to exploration and purchase." In order to encourage prospecting and actual resource development, and to discourage simple speculation in or aggregation of land, the statute required the claimant actually to locate a valuable mineral deposit, and further provided, for each "location," that "until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." 30 U.S.C. 28. Failure to do this assessment work, in general, entitled others to relocate the claim, as if no location had ever been made. But if the locator resumed assessment work before a relocation occurred, the original location prevailed. Once $500 in development work had been done upon the claim, a nominal price had been tendered, and procedures testing the validity of his discovery and possible competing claims had been followed, the locator was entitled to a patent, conferring ownership rights to the land and minerals concerned.

Obviously, under this scheme a location was a valuable property right which, if maintained, could not be defeased by others, including the government. If it was not maintained, the statute provided a mechanism—relocation—by which other prospectors could obtain it for their own, more diligent mining purposes. This mechanism well served the statute's development purposes. The statute did not state, however, whether and under what circumstances the government could recover its rights to the land, includ-

ing the right to exploit minerals on it, if a locator failed to fulfill the assessment work requirement.

Difficulties with the Mining Act scheme began to become apparent in connection with prospecting for liquid petroleum, which had been brought under the mining laws in 1897, 29 Stat. 526. Unlike metalliferous minerals and oil shale, petroleum occurs only at great depths. But a valid location under the Mining Act can be obtained only upon actual discovery; while the law might protect one drilling for oil against forceful interference, the prospector got no exclusive right to the premises until he actually struck oil. Since the size of a location which could be obtained upon discovery was limited, and drilling expensive, oil prospecting was both chancy and—where oil was found—likely to be highly exploitive. Wells would be crowded together on the located premises and an effort made to drain the pool before someone else drilling at another spot could tap it.

In 1909, concern over these problems, and their impact upon the fuel-oil dependent naval forces in particular, led the President to withdraw a large amount of land suspected to be oil-bearing from exploration, location, and purchase under the Mining Act. In his Executive Order he provided, however, that "[a]ll locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination." Among the controversies this action precipitated was whether the land withdrawn included land on which drilling or other development activity was taking place but on which no

discovery—and hence no valid claim—had yet been made. This issue was ultimately resolved in the courts against such withdrawal, *e.g., Consolidated Mutual Oil Co.* v. *United States,* 245 Fed. 521 (C.A. 9), but in the meantime Congress had passed an act, basically confirmatory of the presidential withdrawal power, which expressly declared:

> That the rights of any person who, at the date of any order of withdrawal, is a bona fide occupant or claimant of oil- or gas-bearing lands and who, at such date, is in the diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work. [Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 142.]

The effect of the withdrawal of oil and gas lands, and other withdrawals which had been made of coal and phosphate-bearing lands, see, *e.g., United States* v. *Midwest Oil Co.,* 236 U.S. 459, 478–479, created a very substantial pressure for revised federal mining laws concerning these minerals. The imminence and ultimate coming of the World War, the desire of the western states for renewed life in their exploitative industries, and fears of depletion and of monopolistic sequestration of those resources still available to the public all contributed to this pressure. See, *e.g.,* 56 Cong. Rec. 6995 (1918). Beginning in 1914 with H.R. 16136, a bill to authorize exploration for and disposition of coal, phosphate, oil, gas, potassium and sodium on public lands, see H.Rep. No. 668, 63d Cong., 2d

Sess. (1914), a mineral leasing program was considered by each Congress until the Mineral Leasing Act of 1920 was passed by the Sixty-Sixth Congress, 41 Stat. 437.

Each of the drafts sought to deal, *inter alia,* with the problem which had concerned the President and the Congress at the time of the oil withdrawals—what to do about persons actively prospecting at the time the change was made. Each provided, in more or less identical terms, for two modes of handling that problem. Any person having a valid claim (including oil prospectors in the course of seeking discovery) could upon relinquishment of his claim obtain a lease under the provisions of the act for the land relinquished (*e.g.,* 30 U.S.C. 228, 241); or, a person with a valid claim who maintained it thereafter in compliance with the laws under which it was initiated could perfect it under those laws. See, *e.g.*, S.Rep.No. 319, 64th Cong., 1st Sess. 3–6 (1916, regarding H.R. 406); H. Rep. No. 563, 65th Cong., 2d Sess. 5, 8, 15–18 (1918, regarding S. 2812). Discussion of the prior claim problem in the reports and in the Congress was almost exclusively limited to the issue which had been controversial in 1909 and 1910, how to deal with persons who were drilling for but had not yet found liquid oil when the Act was passed. Thus, in enacting the statute in 1920, Congress inserted the words "including discovery" in the maintenance-of-claim provision to make clear that the solution first adopted by the President in 1909 and accepted by Congress in 1910 was carried forward into the new act, 58 Cong. Rec. 4577–4585

(1919). As passed, the maintenance-of-claim provision, now embodied in 30 U.S.C. 193, stated:

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals * * * shall be subject to disposition only in the form and manner provided in this Act [*i.e.*, by leasing], except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery. [41 Stat. 451.]

THE OIL SHALE CLAIMS

Because anyone who actually did strike oil and thus obtain a valid location under the Mining Act would either proceed immediately to patent or, more-or-less automatically in the exploitation of his claim, spend the $100 annually required to maintain the claim, Congress had no reason in 1920 to discuss the meaning of the requirement that claims be maintained as applied to valid locations, and no particular attention was paid to that issue. Disputes over that question subsequently arose only with regard to oil shale claims, such as are at issue here.

Oil shale exists in prominently exposed outcroppings and vast quantities throughout western Colorado and bordering parts of Wyoming and Utah. It is a mixture of rock and oil-producing substance from which oil may be distilled but—unlike coal—it is unusable as fuel in its natural state. Thus, although easy to find it is hard to use. No commercially feasible extractive process for mining the rock and distilling

the oil was known in 1920 or is known now. Yet it is apparent that such a process will have to be found as the world's supplies of crude (liquid) oil are used, and at various times pessimistic estimates of the remaining crude oil supply have made that moment seem nearer.

The World War I period was the first of those times. In 1916 the oil shale lands were for the first time classified as mineral lands (and thus removed from acquisition under the non-mineral land laws), and a number of Naval Oil Shale Reserves were established.[1] There was an immediate rush to locate claims on these lands; while the exact number of locations cannot be known, the investigations and cancellation proceedings of the 1920's and 1930's revealed more than 30,000 such claims embracing more than 4,000,000 acres of public domain (App. 68). However, although the shale was readily accessible, nowhere did mining or processing begin; the speed with which large numbers of claims were made by small groups of men[2] made clear that the claimants were chiefly speculating on the value the lands would have should the apparent shortage in liquid petroleum resources prove incurable.

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[1] One of these included the so-called Oyler claims, involved here in the *Brown* case. Under a reservation clause similar to that which appeared in the President's 1909 order, those claims would be recognized so long as they remained valid, but otherwise revert to the reserve.

[2] See Appendices A and B to the government's district court brief, printed and submitted as a supplement to the government's brief in this Court (esp. pp. 5–9).

371-067—69——2

By the early 1920's the war had ended, the Mineral Leasing Act had encouraged the adoption of more efficient oil well management techniques (leading to better utilization of existing pools) and vast additional crude oil resources had been found. The interest in oil shale flagged. Only a very few leases and patents were sought. On the other outstanding claims, assessment work ceased to be done. The speculative bubble, for the moment, had burst. But because the Mineral Leasing Act had ended the possibility of *new* locations being filed in place of those which were not being kept up, the thousands of claims located in the earlier excitement remained unchallenged on the books.

In these circumstances, the Secretary sought to identify the outstanding claims and, where he found them open to attack as invalid, to commence proceedings for their cancellation. He did so because he believed that

> The public interest dictates that the facts bearing upon [validity] should be ascertained and established when the evidence is available, and not postponed to await the day now apparently remote and unpredictable, when mining operations to extract oil shale have become economically practical and profitable, and rights under the leasing act would be invoked by persons wishing to avail themselves of its provisions, but when in all probability the question of whether a particular tract of land was within the purview of the act or within the exception of valid claims would be difficult to resolve correctly because of the obliteration or effacement of evidence by lapse of time, and spurious claims

> would have to be permitted to stand for lack of evidence to establish their invalidity. [*The Federal Shale Oil Co.*, 53 I.D. 213, 216.]

At first he proceeded on all grounds that might show the invalidity of claims—fraud, abandonment, and want of discovery as well as failure to perform the statutory assessment work. See, *e.g., Gabbs Exploration Co. v. Udall,* 315 F. 2d 37 (C.A.D.C.), certiorari denied, 375 U.S. 822. The manpower available for the task was limited, however, and when it became apparent that few were responding and that assessment work generally had not been done, he began a practice of limiting the investigations and charges to the assessment work issue. On the theory that the Act of 1920 would operate, of its own force, to withdraw claims from location as soon as assessment work was not done, he proceeded against any claim on which assessment work had ever lapsed, without regard to whether it had been resumed or whether any special government claim on the property had been made during the period of lapse.

As noted, few responded to the proceedings and fewer appealed adverse determinations, even within the administrative process. Some of respondents' predecessors were among those who failed of any response.[4] One of the persons against whom the Secre-

[4] Detailed histories of the titles and the assessment work contest proceedings regarding the claims in this case are set forth in Appendices B and C, respectively, to the government's trial brief. These appendices have been reprinted and are contained in the supplement to the government's brief in this Court. See, *e.g.*, 102–108, 109, 116, 122.

tary acted, however, one Emil Krushnic, appears to have been in active prosecution of his claims. Owning six claims, Mr. Krushnic and his partners had done over $600 assessment work each year, but in one year did that work in a manner which the Secretary believed could not be attributed to all the claims. The Secretary sought to cancel the "unworked" claim on this more-or-less technical basis, *Emil L. Krushnic*, 52 L.D. 295, and Krushnic sought relief in the courts. He succeeded in the lower courts, and when the government brought the case to this Court, it affirmed. *Wilbur* v. *Krushnic*, 280 U.S. 306. Under the mining laws as they existed prior to 1920, the Court reasoned, a failure to do assessment work would have been of no consequence so long as it was resumed before someone else actively asserted his interest in the land, as by relocation. At least in the absence of some affirmative action by the Secretary, it concluded, the Mineral Leasing Act did not establish a government "relocation" interest in the land, and so it remained possible for the claimant to reassert his interest in the land by resuming assessment work, as in fact Krushnic had done.

Krushnic was decided January 6, 1930. On January 27, 1930, the Department "overruled" its prior *Krushnic* holding in a pending case raising the same issue. *Standard Shales Prod. Co.*, 53 I.D. 42, 45; see also *Emil L. Krushnic, On Reconsideration*, 53 I.D. 45. On April 15, 1930, the President, by Executive Order under the Act of 1910, temporarily withdrew from lease or other disposal all deposits of oil shale and

lands containing such deposits owned by the United States, subject to valid existing rights. E.O. 5327; see 53 I.D. 127. And, in that year, the Department embarked on a massive campaign of examination and cancellation of the pre-1920 locations, including reconsideration of many of those which had been cancelled under *Krushnic*.[5] *E.g.*, 53 I.D. 131. In these new proceedings, the Department acted only where assessment work had lapsed and had not been resumed; in such cases, it entered the land, posted it, and informed the claimant that by reason of the default, the United States had taken possession. See *The Federal Shale Oil Co.*, 53 I.D. 213, 215. For the fiscal year ending June 30, 1931, 1,181 oil shale locations embracing approximately 140,540 acres were declared null and void in this manner; in the following year, 10,918 locations embracing 1,294,500 acres were voided; and in fiscal 1933, 11,146 locations embracing 1,448,980 acres were cancelled. (App. 78). It is apparent from the great volume of claims disposed of, and the trickle of administrative and judicial challenge, that the great majority of mining claimants must have defaulted, taking no action whatever to protect their

[5] The Secretary's annual report for 1930 stated (App. 70):

> Oil-shale lands, though having no immediate value for oil, have received vigorous protection. During the past year, commencing last spring, every mining engineer in the General Land Office, save three, was called off other work and under my personal orders assisted in identifying, examining, and physically posting more than 6,400 oil-shale claims with notice of default to the United States for failure of the claimant to perform assessment work. This followed the Supreme Court decision of *Wilbur* v. *Krushnic* * * *.

interest in what then appeared to be worthless property.[6]

Among the few who contested these proceedings were the claimants in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639. They alleged in a complaint which the government accepted as true for the purposes of the case that they had performed assessment work for every year through 1930; that there was then a fifteen-month lapse terminated by the government's action; that they stood ready to resume assessment work but were not permitted to do so; and that there had been neither relocation of their claims nor application to lease them during the period of assessment work lapse. In this Court, the government argued that now it had supplied the elements of non-resumption and challenge which had been missing in *Krushnic,* and that it was therefore appropriate to hold that the claims were not ones which had been "maintained" as the exception to the Leasing Act required. This Court acknowledged the Secretary's authority "to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment," 295 U.S. at 645, but appeared to conclude that a failure to do assessment work could be challenged only by relocation—an act, of course, impossible under the 1920 Act. A claim would be "maintained" within the statutory meaning, the Court reasoned, if there was

[6] For the history of the cancellation proceedings involving the claims in this case, see Appendix C to the government's trial brief, reprinted and contained in the supplement to the government's brief in this Court. See, *e.g.*, pp. 146–151.

a resumption of work; therefore, the allegations that the claimants there had arranged to resume work showed that they were maintaining their claim and that it was valid. At 646. The Court concluded that "the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law." At 647.

The Secretary promptly "overruled" the contrary administrative decisions, *The Shale Oil Co.,* 55 I.D. 287, vacated pending cancellation proceedings and, for a time, stood ready to reopen cancellations which had already been made final. But there was little immediate public response to this Court's action. At that time few claimants had any desire to resume working their claims; despite the massive record respondents sought to compile in the district court on the Secretary's alleged administrative practice of treating the cancellations as null and void, they were able to show only a handful of mining claimants who corresponded with the Department about their claims between 1935 and 1944. All told, only about 74,000 acres of the several million acres of claims cancelled have been reduced to patent in all the years since 1935 (App. 29). It seems clear that a major factor in this lull was a complete lack of interest in the oil shale claims which had been located for speculative purposes more than fifteen years before. That lack of interest included the claims involved in these cases. With one exception, no efforts were made by the original claimants or their successors to clarify their status from the time of cancellation to the proceedings out of which these appeals arose.

Since the President created the first Naval Oil Shale Reserve in 1916, the government and others have sought to put the oil shale lands to many other, conflicting uses.[7] In addition to the congressional establishment of a leasing system through the Mineral Leasing Act in 1920, all oil shale deposits have been withdrawn by Executive Order and reserved for investigation, examination and classification. E.O. 5327, *supra*. Executive Order 6016, issued February 6, 1933, authorized the issuance of oil and gas leases on oil shale lands. Such leases have been issued, for example, on 8,860 acres of the lands involved in this case, and applications are pending on an additional 5,280 acres (R. 7945–7948).[8] Proceedings have been instituted under the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. 527, to determine the rights as between the oil and gas lease claimants and the oil shale placer claimants (App. 371). Patents under the Homestead Act and other non-mineral land laws have been issued in 1,400 acres of these lands, pursuant to entries made subsequent to the alleged location of those claims (R. 7794–7839).[9] Much of the land, except that

[7] The uses, both as regards oil shale lands generally and the respondents' claims in particular, are shown in fuller detail in Appendices A and D to the government's trial court brief, reprinted in the supplement to the government's brief in this Court. *E.g.*, pp. 26–35; 175–181.

[8] References indicated by R. are to the full trial court record.

[9] The case of *Freeman* v. *Summers*, 52 L.D. 201 (1927), is a good illustration of this type of conflict. Exhibit S shows that the oil shale claims held by Freeman were subsequently declared invalid on an assessment work charge in 1931, that the homestead entry of Summers was reinstated as a result of the

patented under the non-mineral land laws, is used in support of livestock operations pursuant to the Taylor Grazing Act, 43 U.S.C. 315 (R. 7948–8463).[10]

RECENT DEVELOPMENTS

Since about 1949, there has been a revival of interest in oil shale, and there have been numerous attempts to assert the old, ostensibly cancelled oil shale locations in applications for patent. (App. 152–157). If the claims involved in this case are any indication, however, it is rare indeed that the applicant is a direct successor of an original locator rather than a speculator who in recent times and for small amounts of money purchased a partial interest in the locations and then proceeded to forfeit out other locators and their heirs. As shown in detail in Appendix B to the government's trial court brief, reprinted as part of the supplement to the government's brief in this Court, 100 of the 104 claims involved in the present litigations were the subject of such forfeiture proceedings. See, *e.g.,* Supp. pp. 51–52, 102–108.

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decision declaring the mining claims null and void and that in 1932, three years prior to the *Virginia-Colorado* decision, a patent was issued to Summers for his homestead.

[10] Physical actions have been taken in reliance upon those various types of interests. Thus, fences, reservoirs and other range improvements have been construed thereon in accordance with cooperative projects between the livestock operators and the Bureau of Land Management of the Department of the Interior; and reservoirs and other facilities used by the Bureau of Mines in connection with its experimental oil shale operation at Rifle, Colorado, have been constructed on part of the lands included within the claims here involved (R. 8550).

The history of the 48 "Bute" claims sold and leased to the Oil Shale Corporation for more than $1,500,000, is a typical example. These were located by nine individuals, of whom only eight were named on any one claim, on 7,680 acres of oil shale lands in December 1919 and January 1920.[11] (R. 2291–2316). The land records show an entry in February, 1921 (R. 2337), giving notice in lieu of assessment work, as a Joint Resolution of 1919 had permitted (41 Stat. 354). No other entries were made until 1954—although a person performing assessment work or claiming under a congressional suspension of the assessment work requirement is ordinarily required to record such work or claims. In 1954, one Tell Ertl recorded a quitclaim deed from a James Murphy, apparently one of the original locators (and upon whom service had been had when the claims were cancelled in 1931; see Supp. p. 113), conveying his 1/8 interest in 43 of the 48 claims for $100.00 (R. 2339, 7463). Later that year, Ertl recorded another such deed from a Steven A. Murphy, apparently another of the original locators (and upon whom service had been had, Supp. p 113), quitclaiming his 1/8 interest in 42 of the 48 claims, also for $100 (R. 2340, 7463). In July of 1955, Ertl then filed an Affidavit of Annual Labor, claiming to have done $100 assessment work on each of these (and other) claims (R. 2345–2349). A few days later, he began publication

[11] The information in this history is drawn from land record abstract entries and the answer to interrogatories of the Oil Shale Corporation, as shown in greater detail in the part of Appendix B to the government's trial court brief dealing with the Bute Claims, reprinted as part of the supplement to the government's brief in this Court (Supp. pp. 59–69).

of forfeiture notices in the weekly newspaper of the small town [12] of Grand Valley, Colorado, calling upon each of the original locators or their heirs to contribute their fair share of the assessment labor (R. 2363–2365). In an affidavit of January 13, 1956, he alleged that he had received no contributions in response to this publication (*ibid.*) and on May 7, 1956, a quiet title decree was issued by the District Court of Rio Blanco County, Colorado, finding Ertl to be the owner of all outstanding interests in the 48 Bute claims (R. 2368–2369). Through a complicated series of transactions [13] in the 1960's, interests in these claims were sold and leased to the Oil Shale Corporation at a price substantially in excess of $1,500,000 (R. 2377, 2412, 2410–2411, 2419, 2461–2471, 7461).

However they obtained their claims, three of the respondents applied to the Secretary to reduce them to patent. The Secretary rejected the applications on the ground that while his predecessor may have erred in cancelling the claims in the late 1920's and early 1930's for failure to do assessment work, he did have jurisdiction over the subject matter and his acts therefore were not void. The Secretary recognized that he

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[12] The 1956 Rand McNally Commercial Atlas and Marketing Guide gives the population as 296.

[13] The transactions were complicated by the fact that one H. A. Dutton, Jr. had been engaging in similar operations after having secured a quitclaim deed from one who may have been one of the heirs of one of the original locators (R. 2355, 2378–2380). Although Dutton seems not to have responded to the quiet title proceedings, there appears to have been some accommodation to his "interest."

could revive the cancelled claims in the exercise of his supervisory authority, but, after the many years of asquiescence, declined to do so. He stated (*Union Oil Company of California, et al.* 71 I.D. 169, 177; App. 362): "the decision nullifying the claim will be treated as conclusive and will not be reopened in the absence of a legal or equitable basis warranting reconsideration."

The fourth respondent, the Oil Shale Corporation, did not apply to the Secretary but sought a declaratory judgment in the United States District Court for the District of Colorado that the Secretary was without right in subsequent patent proceedings to assign any weight to the cancellations of the 1920's and '30's. The case was consolidated with the three challenges to the administrative action, and the district court found, contrary to the Secretary, that the cancellations could not be relied upon (App. 46–47).

The court of appeals affirmed on the ground that this Court's decision in *Virginia-Colorado, supra*, "must be taken by us to hold that the Secretary was without power or authority under the laws to bring the adverse proceedings on the ground it [sic] did, and to so cancel the claims. This in the administrative area must be taken to mean his actions were void and of no legal effect" (App. 442).

SUMMARY OF ARGUMENT

I

This Court has affirmed in sweeping terms the Secretary's subject-matter jurisdiction to determine

statutory rights of individuals in the public domain. "[S]o long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void." *Cameron* v. *United States,* 252 U.S. 450, 460. "[T]he Department has been granted plenary authority over the administration of public lands, including mineral lands * * *." *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336. Although disputes over the validity of mining locations are generally heard in state courts, that is only because generally the federal government has no occasion to question them before applications for patent is made; *Humboldt Mining* makes plain that the Secretary has power to resolve a validity issue before patent where there is reason to do so. It is clear that such reasons existed in the unusual circumstances which led the Secretary to initiate the challenged cancellation proceedings during the 1920's and 1930's.

Nothing this Court said or did in *Wilbur* v. *Krushnic,* 280 U.S. 306, or *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U.S. 639, compels the conclusion that the Secretary lacked subject-matter jurisdiction to challenge mineral locations on land which the government wished to withdraw for its own purposes, where the locators had failed to perform the statutorily required assessment work. On the peculiar facts of *Krushnic,* the Court had to determine only that no withdrawal had taken place before assessment work on the challenged claim had been resumed; it care-

fully reserved for later decision the question whether a mining location could be canceled during a period of assessment work lapse and in response to a specific assertion by the government of its interest in the land. The right of the government to withdraw under such circumstances had often been declared in administrative proceedings involving the creation of Indian and military reservations, irrigation projects, and national parks out of the public domain. In *Virginia-Colorado*, it was necessary to decide only that the claimants there "maintained" their claim within the meaning of the statute when they respondsd to the Secretary's challenge with a declaration of readiness promptly to resume the performance of assessment work. But those who permitted the Secretary's action to become final did *not* respond to the Secretary's challenge, and thus did not "maintain" their claims even to the slight extent the Court found sufficient; the Court's opinion suggests no purpose or occasion to rule that the cancellations made in those cases were without legal force.

The provision of the statute requiring locators to "maintain" their claims in the manner provided by law required interpretation. The Secretary had subject matter jurisdiction to construe the statute, and authority to initiate administrative proceedings testing the validity of claims in advance of application for patent. That he may have erred in interpreting the maintenance requirement as he did, and thus in bringing pre-patent proceedings based upon that construction, does not undercut his authority, and hence

affords no occasion for collateral attack. The contrary conclusion would render administrative proceedings in general uncertain, and would have untoward consequences for the public domain.

II

It was well established at the time the Mineral Leasing Act of 1920 was passed that although in general the government had no interest in the validity *vel non* of mining locations prior to patent, it did have such an interest where, acting as if it were a relocator, it wished to withdraw the lands to a different public use—for example, a military or Indian reservation, irrigation works, or a national park. In such cases, lands subject to location at the time of withdrawal either were permanently excluded from the scope of the federal project, or were taken into it reserving the existing location right *so long as it was maintained.* In the case of exclusion, the lands remained subject to the mining laws, and other prospectors could relocate them if the original locator ceased his assessment work; in the case of incorporation, the government could claim the lands if that work was not done. No one ever suggested that locations might be immunized both from relocation and from government withdrawal in the event of assessment work lapse. Since the Leasing Act withdrew the lands from relocation and specifically required that existing locations be "maintained," the lands here were subject to withdrawal by the government when assessment work lapsed. If, as this Court held in *Krushnic,* the

1920 Act did not itself work such a withdrawal, all necessary steps were taken by the 1930's, when oil shale lands were withdrawn even from leasing by Executive Order and the Secretary caused each of the challenged claims to be posted by the government during a period of lapse in assessment work.

Indeed, both the legislative history and the form of the Leasing Act make plain that Congress contemplated diligent working of existing claims in order to preserve them under that Act. The legislative history shows that all the debates about continuing to recognize prior claims centered on the claims of persons drilling for oil but who had not yet discovered it; the plight of such persons, who often invested substantial amounts of money in the search, had occupied the Congress' attention since 1909, when the President first withdrew oil lands from location under the Mining Act. Although such persons were thought to be entitled to continue drilling after an intervening withdrawal, albeit they had not yet discovered oil, there was general agreement that they should be diligent in doing so. No one expressed the view that a person with a location valid in 1920 should be permitted to sit on it for 10, 20, or 50 years, using it for no other economic purpose than the occasional grazing of livestock. That question did not arise because oil shale was not introduced into the proposed coverage of the Act until 1918—four years after debates over mineral leasing bills began; regarding the preservation of rights in oil shale claims, the legislative history remarks principally that the locator "may, upon re-

linquishing his claim, be entitled to a lease." H. Rep. No. 563, 65th Cong., 2d Sess. 18 (1918).

The "lease" spoken of refers to an alternative to the requirement of maintenance offered oil shale claimants who had located their claims before 1919—that is, at an early, pre-"land rush" stage. It was known at the time that oil shale was without current commercial use, as it is today, and would require extensive technological development for its exploitation, as it still does. A lease offered the advantage of a five-year hiatus in financial obligations, to "encourag[e] the production of petroleum products from shales." 41 Stat. 446. That respite would be valuable only if a claim would otherwise have to be worked. It is incomprehensible that Congress would have permitted only five years of unproductive landholding under the lease but—by withdrawing the possibility of relocation yet providing no means for government enforcement of the assessment work requirement—would have permitted (to date) fifty years of unproductive landholding under the existing locations. This Court erred in depriving the government of the enforcement mechanism for assessment work which the Secretary had earlier established in withdrawal cases.

371-067—69——3

ARGUMENT

I. THE SECRETARY HAD SUBJECT-MATTER JURISDICTION OVER THE CANCELLED CLAIMS, AND THEREFORE IS NOT FORBIDDEN FROM GIVING EFFECT TO CANCELLATIONS WHICH BECAME FINAL PRIOR TO THIS COURT'S DECISION IN ICKES V. VIRGINIA-COLORADO DEVELOPMENT CORP.

The principal ground of decision in the court of appeals was that the cancellations involved in this case were void, and hence subject to collateral attack, under this Court's holding in *Virginia-Colorado* that such cancellations "went beyond the authority conferred by law." 295 U.S. at 647. This reading is in conflict with the decisions of this Court on the scope of the Secretary's jurisdiction to decide questions involving the public lands, and if permitted to stand would seriously encumber his administration of those lands.

In general, administrative decisional action is a legal nullity, and thus subject to being ignored or to collateral attack, only in circumstances in which judicial action would similarly be void—*e.g.* defect of process, fraud in the proceedings, or the absence of power in the agency to consider the question put. *Cameron* v. *United States,* 252 U.S. 450, 459–460; *Callanan Road Co.* v. *United States,* 345 U.S. 507, 512; Davis, *Administrative Law Treatise,* sec. 18.10 (1958 ed.). In the present case, the asserted defect is in regard to the

last of these, subject matter jurisdiction.[14] Accordingly, we examine that question.

A. THE SECRETARY HAS SUBJECT-MATTER JURISDICTION OVER CLAIMS TO POSSESSORY RIGHTS OVER LANDS AS TO WHICH TITLE REMAINS IN THE FEDERAL GOVERNMENT.

As a general proposition, there could be no doubt that the Secretary of the Interior has subject matter jurisdiction to determine the existence of statutory rights accorded individuals to secure the transfer of rights and title to the public domain from public to private ownership. This Court has consistently held that the Department of the Interior has an all-inclusive subject-matter jurisdiction to determine the validity of mining claims (like all other claims to statutory rights in the public domain). *United States* v. *Schurz*,

[14] Regarding the question of notice, the Secretary has held that the old default proceedings are subject to reopening as to any locator for whom receipt of service is not adequately shown. *Union Oil Co. of California*, 72 I.D. 313. It does not follow, however, that respondents are entitled to partial rights to each of the contested locations. If they obtained the rights of unserved persons through forfeiture proceedings based on quitclaim deeds obtained from persons who *had* been served, p. 20, [redacted] and the cancellations as to persons served are valid, it appears that respondents gained nothing. That is, the rights of unserved persons can be obtained only directly, and not through forfeitures based on a cancelled claim.

Moreover, if the Court accepts our second proposition, that *Virginia-Colorado* was in error and should be overruled, the Secretary would be able to require any applicants for patents to show that they had been doing assessment work at the time the lands were posted and withdrawn in the 1930's, whether or not personal service could be established.

102 U.S. 378, 395–396; *Bishop of Nesqually* v. *Gibbon,* 158 U.S. 155, 167; *Michigan Land and Lumber Co.* v. *Rust,* 168 U.S. 589, 593; *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316, 324–325; *Cameron* v. *United States,* 252 U.S. 450; *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 335. It is necessary to discuss only the last two cases cited, each of which involved questions relating to the subject-matter jurisdiction of the Secretary of the Interior to determine the validity of mining claims.

In *Cameron,* this Court rejected a challenge to the authority of the Secretary to pass on the validity of mining claims and commented upon his power in sweeping language (252 U.S. at 459–460):

> The second objection rests on the naked proposition that the Secretary was without power to determine whether the asserted lode claim, under which Cameron was occupying and using a part of the reserves to the exclusion of the public and the reserve officers, was a valid claim. We say "naked proposition" because it is not objected that Cameron did not have a full and fair hearing, or that any fraud was practised against him, but only that the Secretary was without any power of decision in the matter. In our opinion the proposition is not tenable.
>
> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exer-

> cised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stats., §§ 441, 453, 2478; *United States* v. *Schurz,* 102 U.S. 378; *Lee* v. *Johnson,* 116 U.S. 48, 52; *Knight* v. *United States Land Association,* 142 U.S. 161, 177, 181; *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316.
>
> * * * [S]o long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. * * *

Humboldt Mining reaffirmed this broad statement of the Secretary's authority. That was a case in which the government sought to condemn land which included an existing mining claim, which the claimant had never sought to reduce to patent. Over the claimant's objection, the condemnation court referred the issue of the validity of the claim—there challenged for want of discovery—to the Department of the Interior. If the claim was valid, the government would have to pay just compensation; if not, it was under no such obligation. This Court upheld the reference thus made:

> We deal here with a unique form of property. A mining claim on public lands is a possessory interest in land that is "mineral in character" and as respects which discovery "within the limits of the claim" has been made. *Cameron* v. *United States,* 252 U.S. 450, 456. The discovery must be of such a character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with

> a reasonable prospect of success, in developing a valuable mine." * * *
>
> Respondents' mining claims are unpatented, the title to the lands in controversy still being in the United States. The claims are, however, valid against the United States if there has been a discovery of mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met. *Cameron* v. *United States, supra.* The determination of the validity of claims against the public lands was entrusted to the General Land-Office in 1812 (2 Stat. 716) and transferred to the Department of the Interior on its creation in 1849. 9 Stat. 395. Since that time, the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them. [371 U.S. at 335–336.]

It is thus established that the Secretary's subject-matter jurisdiction over disputes concerning the validity of mining claims on the public domain is not limited to those which come before him in the course of an application for patent.

Respondent's argument to the contrary will undoubtedly start with the proposition that, nonetheless, disputes over the validity of locations as distinct from patent claims are generally heard in state courts rather than the Department, and that in particular the Department has not otherwise claimed jurisdiction to enforce the assessment work requirement of the Mining Act. But neither proposition has ever been entirely true.

Humboldt Mining itself is one example of a situation in which the Department was properly called upon to resolve an issue of validity before patent. And, as we show in greater detail within, pp. 50–56, while the government in general has not undertaken to enforce assessment work requirements, that is because in general it has had no competing use to which it wished to put the land involved. In the absence of such uses it has relied on the possibility of relocation by other prospectors to encourage the work towards development of the nation's mineral resources which the Mining Act as a whole was meant to promote. Where there *was* a competing use for which the government wished to reserve the land—for example, a national park—the Department has asserted its jurisdiction to adjudicate the performance *vel non* of assessment work, and declared locations invalid where that work was not being done. See, *e.g., E. C. Kinney,* 44 L.D. 580, 582; *Interstate Oil Corp. et al.,* 50 L.D. 262; *Standard Shales Prod. Co.,* 52 L.D. 522; *Hodgson* v. *Midwest Oil Co.,* 17 F. 2d 71 (C.A. 8); 1 Lindley, *Mines* (3d ed. 1914), pp. 398–399. This line of authority was developed at some length in the government's brief in *Wilbur* v. *Krushnic, supra* (No. 63, O.T. 1929, pp. 18–30), and the exposition there no doubt explains why that Court so carefully reserved decision whether some form of challenge on behalf of the United States *during a period of assessment work lapse* would be effective to invalidate a claim. 280 U.S. at 318.

Wilbur v. *Krushnic* does not suggest that the Court believed that problems of subject matter jurisdiction were raised in that case. The case arose in factual circumstances entirely favorable to the claimant. He and others owned six claims and had done over $600 assessment work in every year, including years after that in issue; he applied for a patent in 1922, only two years after the Leasing Act had gone into effect, and would have received it but for an administrative determination that the assessment work done on other claims in one year was not attributable to the claim for which he sought patent. Since the cases on which the government relied in supporting this rather harsh result involved situations where assessment work had entirely lapsed and had not been resumed (*de facto* abandonment) and where the government's interest in the land was rather specifically asserted (quasi-relocation), it is not surprising that the Court declined to interpret the Leasing Act as the government sought—that is, as automatically returning to the government full possessory right to any land subject to oil shale claims once assessment work had lapsed, however technically, for as much as a year and without regard to whether it had been resumed before adverse proceedings were begun. But in reserving the *Virginia-Colorado* question for later decision, the Court gave no hint it thought it would be inappropriate for the Secretary to decide it. It ruled not that it had been wrong for the Secretary to construe the meaning of the 1920

Act, but only that he had construed it erroneously.[15]

Indeed, since it is the Secretary who has the responsibility of administering the public lands, including those affected by the Mineral Leasing Act, it would appear unassailable that the Secretary had the authority to construe the statute and to apply it in accordance with his construction unless and until he was corrected by the courts. *West* v. *Standard Oil Co.*, 278 U.S. 200, 218–220; *Work* v. *Braffet*, 276 U.S. 560, 566. The statute provides that deposits of oil shale on public lands may be disposed of *only* by lease except as to claims which were valid on February 25, 1920, "and thereafter maintained in compliance with the laws under which initiated." Necessarily, the Secretary was permitted to decide what constituted the maintenance called for. As this Court said in *United States* v. *Williams*, 341 U.S. 58, 66:

> "Jurisdiction is the power to decide a justiciable controversy, and includes *questions of law as well as of fact.*" *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 305. Even the uncon-

[15] Nor does the grant of mandamus relief in *Krushnic* carry with it the implication that the Court felt the Secretary had overstepped his jurisdiction in considering what the 1920 Act's maintenance provision meant in regard to the assessment work requirement. *Krushnic* arose out of an application for patent, and it was apparent that if the Secretary had been wrong, he should reconsider the patent application under the correct construction of the statute. Having itself decided how the statute should be construed, the Court was satisfied that the Secretary had no remaining discretion to treat the patent application otherwise. In those days, before other modes of administrative review became familiar, mandamus was an appropriate means of assuring that the Secretary would respect the Court's construction. Cf. *Payne* v. *Central Pac. Ry. Co.*, 255 U.S. 228, 238.

> stitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction. *Chicot County District* v. *Baxter State Bank,* 308 U.S. 371, 376. See also *Stoll* v. *Gottlieb,* 305 U.S. 165; *M'Cormick* v. *Sullivant,* 10 Wheat. 192.

See also *Butte, A. & P. Ry.* v. *United States,* 290 U.S. 127; *Swift & Co.* v. *United States,* 276 U.S. 311, 331. Even if there might be some occasions when a construction strays so far from statutory meaning that it can be said to lack even the color of authority, that is not this case. The Secretary was concerned with the meaning of maintenance, not some extraneous matter, and, as we show within, there was ample statutory and administrative history, as well as an important policy basis, to support the conclusion he reached.

Finally, if the Secretary had jurisdiction to decide what the statutory requirement of maintenance required, he had the authority to determine that issue and apply his construction in advance of applications for patent. This Court has already approved such procedures in *Humboldt Mining, supra.* While that is a recent case, *Cameron* v. *United States, supra,* points in the same direction. In that case, Cameron had applied for a patent on certain lands under the Mining Act which, if not validly claimed, had been withdrawn for use in the Grand Canyon National Monument. The Secretary refused the patent, on the ground that no valuable mineral had been discovered, *and then went on to hold the mining locations on which the patent claims had been premised invalid as well.* 252 U.S. at 457–458. On the basis of this latter hold-

ing, not the refusal to patent, the land was recovered for use in the Monument and the government secured injunctive relief against Cameron's further interference with the land; it was the Secretary's jurisdiction to void the location, not to refuse to patent, which this Court upheld in the sweeping language quoted above.[16] See also *Clipper Mining Co.* v. *Eli Mining and Land Co.*, 194 U.S. 220, 223; *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37 (C.A.D.C.), certiorari denied, 375 U.S. 822; *E. C. Kinney, supra; Navajo Indian Reservation*, 30 L.D. 515; *Arid Land, etc.*, 32 L.D. 387.

The Secretary's forceful remarks in *The Federal Oil Shale Co.*, 53 I.D. 213, 216, make clear why prepatent proceedings were required in the particular case of oil shale:

> The public interest dictates that the facts bearing upon [validity] should be ascertained and established when the evidence is available, and not postponed to await the day now apparently remote and unpredictable, when mining operations to extract oil shale have become economically practical and profitable, and rights under the leasing act would be invoked by persons wishing to avail themselves of its provisions, but when in all probability the question of whether a particular tract of land was within

[16] This further holding may be treated as an adjudication prior to patent, because the denial of a patent does not necessarily invalidate the location on which it is based—for example, if it is found that less than the required $500 development work has been done. Cameron in fact made a subsequent patent application based upon these asserted locations. 252 U.S. at 458.

> the purview of the act or within the exception of valid claims would be difficult to resolve correctly because of the obliteration or effacement of evidence by lapse of time, and spurious claims would have to be permitted to stand for lack of evidence to establish their invalidity.

If the necessary impetus to such proceedings was not supplied by the Leasing Act itself, it was certainly present by 1930, when experience had proved that most oil shale claims were in fact abandoned, the challenged claims were individually posted, and the President by Executive Order withdrew all oil shale lands even from leasing. There was then a specific, competing government use.

B. THIS COURT'S DECISION IN VIRGINIA-COLORADO DID NOT REST ON SUBJECT-MATTER JURISDICTION, OR PURPORT TO DECIDE THAT THE THOUSANDS OF DECISIONS THE SECRETARY HAD MADE WERE OF NO EFFECT EVEN IF FINAL.

In *Virginia-Colorado,* this Court again faced facts which were not typical of the usual case in which challenges based on failure to do assessment work had been brought. The claimants had done assessment work for ten years under the Leasing Act before they stopped, and responded promptly to the Secretary's challenge to their location with an offer to resume it. This Court construed the maintenance requirement of the Mineral Leasing Act as requiring no more than a resumption of work. The *Virginia-Colorado* claimants, it concluded, were entitled to resume, had made arrangements to resume, and would have resumed their develop-

ment work had the government not interfered. 295 U.S. at 646. Those facts were sufficient to maintain that claim.

The facts shown by the title histories and assessment work contest proceedings of the locations involved in this case—summarized at pp. 102–108 and 146–151 of the supplement to our brief here—are more usual: assessment work which stopped in the early 1920's and which was never resumed until a speculator bought quitclaim deeds to a few of the original locators' interests in the 1950's. In most cases, as in most of these cases, not even a feeble response was heard to the Secretary's challenge—there was no effort to maintain, to resume work. Of course, if the Secretary's actions were void, without even color of authority, there was no need to respond, to resume work, or at least to declare one's readiness to do so. But that conclusion would have deprived the maintenance requirement of any meaning at all, and we cannot believe it is what this Court meant to do.

The proceedings of the 1930's were a dragnet operation, and the resumption-of-work rationale would protect those conscientious claim-holders who were caught up for more-or-less technical flaws and then resisted the dragnet's effect; unless associated with the conclusion that the Secretary's action was void, however, that rationale does not aid those who had permitted the Secretary's action to become final. And the Court's opinion does not suggest a purpose to resurrect those cancelled claims.

The support for the voidness contention is the final sentence of the opinion:

> We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. [295 U.S. at 647; App. 442.]

But we cannot view this statement as necessarily embodying more than that the Secretary's error in construing the maintenance provision subjected that cancellation proceeding, and the complaint which initiated it, to dismissal for failure to state a cause of action. Such a failure in any adjudicated controversy, whether heard judicially or administratively, is no ground to set the decision aside as void after it has become final. Cf. *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 561; *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 Fed. 316, 318 (C.A. 8); Moore, *Federal Practice* (2d ed. 1968) par. 60.25[2]; Boskey and Braucher, *Jurisdiction and Collateral Attack*, 40 Col. L. Rev. 1006, 1013.

The Secretary has subject matter jurisdiction to construe the statute and to initiate proceedings to test the validity of locations under his construction. As Chief Justice Hughes, the author of *Virginia-Colorado*, remarked in a later, landmark case, there was "full opportunity to present any objections to the proceeding, not only as to its regularity * * * but also as to the validity of the [interpretation] under which the proceeding was brought * * *." *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 375. Respondents and their predecessors, "having the opportunity to raise the question of invalidity, were not the less

bound by the decree because they failed to raise it." *Ibid.* In *Virginia-Colorado,* this Court had neither occasion nor reason to decide the contrary.

C. A CONCLUSION NOW THAT THE SECRETARY'S ACTIONS IN THE 1930'S WERE VOID AND WITHOUT ANY RECOGNIZABLE EFFECT WOULD HAVE UNTOWARD CONSEQUENCES FOR THE PUBLIC DOMAIN.

The same practical considerations of need for finality in the administration of justice which limit the circumstances in which judicial actions will be found to have been void also apply in the administrative setting. If it is decided that courts have been applying an erroneous principle of law in a class of cases, it would nonetheless be chaotic to declare that all prior decisions based on that principle, however final, are thereby deprived of effect. *Chicot County Drainage District, supra,* 308 U.S. at 374–375. Indeed, even in criminal cases involving ongoing deprivations of personal liberty and matters of constitutional principle, the need for finality often prevails in determining whether judgments based on erroneous principle shall be subject to collateral attack. *E.g., Tehan* v. *Shott,* 382 U.S. 406. When administrative agencies err in applying the governing law, their action is frequently characterized in such terms as "beyond the authority conferred by law," 295 U.S. at 647; if on each such occasion all prior, final decisions resting on the same error were thereby nullified, agencies would be subjected to a far heavier burden of litigation, and the certainty of their adjudications would be substantially compromised.

In the particular case of the Secretary of the Interior, that burden would be insupportable. He is entrusted with management of the entire public domain. This Court noted the magnitude of that operation in *Humboldt Mining Co.*, 371 U.S. at 339 n. 8, and *Boesche* v. *Udall*, 373 U.S. 472, 484 n. 13: during fiscal 1961, 27,228 mining claim adjudications were closed, and at the outset of that year, 159,000 mineral leases covering 125,000,000 acres of public domain were outstanding, requiring his supervision under the Mineral Leasing Act. In view of these responsibilities, and others like them, it is manifest that the Secretary must be able to rely on his records of action taken affecting the land under his control, where those actions are not directly challenged by the individuals concerned. If legal error in a determination serves to render all prior, similar determinations void, this certainty—always thought particularly essential in the context of transactions affecting land—will be unattainable.

It is clear, moreover, that the cancellations of the 1920's and 1930's—although they may have been erroneously based—served the basic public policy of clearing public lands of abandoned claims to facilitate their use in the public interest. The Secretary moved to promote those uses. Under the Mineral Leasing Act, all the lands were reserved for disposition under a leasing system providing for rentals, royalties, and continuing supervision for the benefit of the public

as a whole.[17] Indeed, oil and gas leases have been issued on 8,860 acres of the lands involved in this case, and applications for leases are pending on an additional 5,280 acres (R. 7945–7948). Other of these lands have been withdrawn by Presidential order and placed in national reserves under the administration of the Department of the Navy (R. 7683–7693). Patents have been issued on 1400 acres of these lands under nonmineral land laws since the alleged location of these claims (R. 7794–7839). Bureau of Mines facilities have been constructed on part of the land here involved, in connection with the experimental oil shale operation at Rifle, Colorado (R. 8550). Almost all of the land is in use as grazing land under the Taylor Grazing Act, 43 U.S.C. 315, and fences, reservoirs, and other range improvements have been constructed to support these operations (R. 7948–8463). If the present holders of the old cancelled claims are able to qualify for patents, they would receive title to the land and be able completely to disrupt this program of use.

It does not follow from the decisions below that respondents are entitled to patents, since the claims remain subject to challenge, *inter alia,* for lack of

[17] Under Executive Order No. 5327, all oil shale deposits were withdrawn from leasing April 15, 1930 and reserved for investigation, examination and classification. Oil and gas leases on these lands were authorized February 6, 1933 by Executive Order No. 6016, and all the leases described in the following text have been issued since that day.

discovery and abandonment. If these issues must be resolved on a case-by-case basis, however, as they presumably would have to be if the prior cancellations cannot be relied upon, the Secretary will be faced with an intolerable burden. There are at least 30,000 claims, most of them involving eight locators when made fifty or more years ago. To clear the title to the oil shale lands might require a diligent search for all their successors-in-interest. To the cost of this search must be added that of litigation. One recent test case on the issue of discovery involved 39 hearing days, a 5,248 page transcript and approximately 2,000 exhibits. Plainly the monetary and administrative costs of contesting the cancelled claims today would be staggering. Anticipation of that cost was, indeed, the principal reason why the proceedings of the 1920's and 1930's were brought at that time. *The Federal Oil Shale Co., supra.*

Moreover, a conclusion that the former proceedings were void—not just erroneously brought—would impede the present resolution of claims to patent or location even in cases where no adverse decision was then made, or if made was void for another reason such as failure of service. It was notorious at the time that the Secretary was undertaking these proceedings to challenge the locations which had been made. If there were a color of authority to his actions, it would be appropriate to conclude that persons who made no effort to protect their locations by responding to service, or by performing assessment work during

the period of challenge, or by resuming it however briefly after *Virginia-Colorado,* had in fact abandoned those claims and thus could not assert them now even if formally entitled to. If the Secretary's actions were without color of authority, however, there would have been no obligation to respond to them and consequently it could be argued that no inference could be drawn from the failure to respond. As it is, respondents are able to argue that no inference can be drawn from their or their predecessors' failure to develop their claims after *Virginia-Colorado,* because this Court there held that all that was required of them was a readiness to resume such work. If the government cannot rely on the pre-1935 history of disregard for these claims, it may be hard-put to resist the basically speculative applications for public lands now being made,[18] and to administer those lands in a rational fashion.[19]

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[18] For example, it would seem patent that, given their history of disuse and non-development, oil shale lands could not meet this Court's clear definition of the "discovery" requirement of federal mining laws in, *e.g.*, *Humboldt Mining*, 371 U.S. at 335–336:

> The discovery must be of such a character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." * * *

But relying on *Virginia-Colorado*, and a policy adopted by the Department in the first flush of excitement over oil shale (see App. 105–110), respondents can be expected to argue that the oil shale was a discovery when made, and that this Court's interpretation of the maintenance requirement renders failure to make further expenditures of labor irrelevant to the discovery issue as well.

[19] The administrative problem of issuing leases for oil shale, oil, sodium and other leasable minerals, in areas which had

II. THE GOVERNMENT IS ENTITLED TO WITHDRAW FROM LOCATION LANDS WHICH IT REQUIRES FOR PUBLIC PURPOSES AND UPON WHICH THE ASSESSMENT WORK REQUIRED BY STATUTE IS NOT BEING DONE

The preceding argument rests on the premise that *Virginia-Colorado* is good law as to the substantive

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previously been cluttered with speculative but undeveloped and unmaintained mining claims, is obvious. If a worthless claim is not terminated by adjudication, it is always capable of arising from its own ashes to harass lessees of the United States. In fact, it was the existence of this problem which gave rise to adoption of the Multiple Mineral Development Act of 1954, 68 Stat. 708, 30 U.S.C. 521 ff., under which mining claimants must assert their interests or lose any right to leasable minerals. The interests, if asserted and valid, would prevail, however.

The hearings on this bill are filled with references to the problem created by the fact that there is no automatic termination of unused and undeveloped mining claims. We quote, in particular, the following from the Hearings, H. Subcommittee on Mines and Mining of the Committee on Interior and Insular Affairs, H.R. 8892 and H.R. 8896, 83d Cong., 2d Sess., p. 31 (1954):

> Mr. DAWSON. In other words, it is sort of a blackmail proposition.
>
> The mining man who has an old claim located, let us say, back in 1918 and has never done anything with it, now comes along and finds you have got a million dollar oil well on there, and therefore he is going to assert the old claim to make you pay off.
>
> * * * * *
>
> Mr. ENGLE. Will you yield for a minute? I think what the gentleman does not understand is this: That after somebody slaps a mining claim on a piece of public land, the mining claim, in the absence of some dispute thereof, continues and has validity. They can file in 1918 and not do a lick of work and not turn a shovel, and there it sits. And unless somebody comes along now with an adversary

issue there decided—whether the Mineral Leasing Act of 1920 entitled the Secretary to enter, post, and withdraw from existing locations public lands on which the assessment work required by the Mining Act of 1872 was not being done. We suggest there that the Court's interpretation of the word "maintained" appearing in the 1920 statute might be read as requiring at least a demonstrated willingness to resume performance of assessment work upon government demand and concede that, if so read, it would not deprive the provision of all meaning. But that reading is somewhat tortuous, and this Court may disagree with our conclusion that these respondents are not entitled now to challenge, in collateral proceedings,[20] the cancellations of years ago. Moreover, although the decision in *Virginia-Colorado* was unanimous, our review of the government's brief in that case convinces us that there

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proceeding against it, asserted by other claimants, not by the Interior Department necessarily, it is not disturbed. So they have these mining claims scattered around like shinplasters all over the public domain, and no one has done anything about them.

What the witness is saying is that somebody wakes up to the fact that the land has become valuable because of other things, and then some sharpster starts looking up the relatives of old Uncle Joe Jones who staked that claim out. They know about it. He has a sister out in Los Angeles and so they go out and run her down. She is dead and her two kids are around there, and they find them, and they get a quitclaim deed from them. Then they go marching back to the fellow who has dug the well and says, "Mr., just pay off or we will start moving in on this claim. We have a bulldozer right out here now."

[20] In district court and the court of appeals, they also asserted a right of direct review.

were numerous matters that were not, but should have been, brought to this Court's attention at that time. Thus, not without hesitation, we suggest that *Virginia-Colorado* should be limited to its own facts, which were somewhat special, and, if necessary, that it should be overruled. For the passing of thirty years—obscuring the identity of those who initially located these claims and opening the possibility of sharp practice and uncertainty of right in the public domain—has raised serious doubt about the validity of that ruling.

A. CONTRARY TO THE COURT'S CONCLUSION IN *VIRGINIA-COLORADO*, AND AS HAD BEEN SHOWN IN THE GOVERNMENT'S *KRUSHNIC* BRIEF, IT WAS ESTABLISHED LAW THAT THE GOVERNMENT COULD INVALIDATE MINING LOCATIONS BY WITHDRAWING TO A PUBLIC USE LAND SUBJECT TO SUCH LOCATIONS IF THE REQUIRED ASSESSMENT WORK WAS NOT BEING DONE.

This Court's decision in *Virginia-Colorado* was based upon the assumption that prior to the Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*, a mining claim could not be challenged by the United States under any circumstances for reason of failure to do the required annual labor.[21] Indeed, in its brief in

[21] Respondents may argue that this Court's decision in *Wilbur* v. *Krushnic* is subject to the same interpretation. Were that the case, we would have to urge that that decision, too, be reexamined. But in light of the special facts of that case, and the careful reservation of the *Virginia-Colorado* question in the Court's opinion, we view it as holding only that the 1920 Act had not by itself worked the necessary withdrawal of land from location, and that at the least some affirmative government action to withdraw the lands during a period of assessment work lapse was called for. Whether or not such a holding is also questionable, it imposes no substantial burden on the development or administration of public lands.

Virginia-Colorado, the Department of Justice apparently assumed the same thing. Although its brief in *Krushnic* had extensively developed contrary authorities, pp. 18–30, in *Virginia-Colorado* the government stated:

> The only requirement for the maintenance of a claim under the old mining law, once the claim had been perfected, was the requirement in Section 2324 of the Revised Statutes (*infra,* p. 22) as to the performance of annual assessment work. That requirement constituted a condition subsequent to the right of exclusive possession granted by the United States to the locator. Failure to comply with the condition opened the claim to relocation by another. It did not, however, result in forfeiture of the claim as against the Government, for the Government had no direct interest in the matter, being concerned only with seeing that its mineral-bearing lands were kept open for private exploitation. [Br. p. 6.]

The only question briefed was whether the Mineral Leasing Act changed the existing law and thereafter required annual assessment work to avoid forfeiture, because the land had been withdrawn from relocation.

The assumption was erroneous. This Court pointed out in *Humboldt Mining, supra,* 371 U.S. at 335, that a mining location is "a unique form of property"—simply a right to possession, creating no rights in the absence of valid discovery, granted only to spur the mining and production of the nation's mineral wealth, and remaining impressed on the land as a cloud on title until dislodged by a contest proceeding, even

though worthless or abandoned. But a mining location is not so unique that it can never be dislodged by the government, however pressing the government's purposes and for however long the claimant has failed to do the required assessment work.

In the early history of the public domain, the United States had no established mining laws. Many of the early claims were staked only pursuant to local miners' rules. They were made on publicly owned lands by virtue of a presumed right. The presumption was correct enough, for originally the United States did wish to encourage development of its mineral riches solely through private exploration and prospecting. This policy was formalized in the Mining Acts of 1866, 14 Stat. 86, and 1872, 17 Stat. 91, 30 U.S.C. 21 ff.

These Acts indicate a complete willingness to permit a prospector to roam the public domain, to establish a claim by location and discovery, to work that claim as long as might be desired and to obtain a patent covering the entire fee upon making certain proofs. Unless claims are advanced to patent, the mining laws did not contemplate that the United States, the Department of the Interior or any other department be given even the basic information that a claim had been located. In fact, the original mining laws displayed a great indifference regarding what particular individuals were staking claims or removing minerals from the vast, difficult terrain that constituted the ordinary mineral areas of the public domain. Disputes between rival locators were left for

settlement on the basis of locally adopted rules in mining districts. Locations were required to be recorded in local county offices for the apparent purpose of permitting a locator to establish priority over later arriving prospectors. The assessment work requirements were imposed to spur development, by assuring that valuable claims could not be sequestered by a person unwilling to work them. But the majority of mining claims were located, fought over and made the basis of production without making the United States, the owner of the land, aware of their existence. It was only when a claimant desired a patent that an entry (the notation of the patent application) was made in the records of a government land office.

In effect, it can be said, then, that in the early days when vast areas were available and the Government's use of its own public lands was minimal no attention was paid to whether mining claims had been located, whether they were valid or whether they had been abandoned. Moreover, even though the law contemplated that mining claims would be worked to produce minerals, and provided for relocation to that end, it contained no specific provision for their termination as a cloud on title when the high hopes faded, the tin can markers rusted, and the claims returned to their primeval solitude.

This indifference changed, however, around the turn of the century. With the growing interest in use of the public lands and mining areas for other purposes, the Government, of necessity, became interested in the validity or nonvalidity of both old and new min-

371-067—69——5

ing claims in such areas. In national forest lands, many mining claims had been made before the withdrawals. Withdrawals for Indian and military reservations, national parks and national monuments included areas dotted with mining claims. The use and patenting of these claims, if valid, was always permitted after the withdrawals. But invalid claims constituted only roadblocks in the administration of the public property.

As early as 1881, in an opinion with respect to lands withdrawn for the Fort Maginnis Military Reservation, the Attorney General clearly indicated that the possessory right attaching to a mining claim within an area subsequently withdrawn is valid against the Government only so long as it is maintained, including the performance of annual assessment work (1 I.D. 552). Subsequent rulings extended that rule to national parks, *Yosemite National Park,* 25 L.D. 48, to Indian reservations, *Navajo Indian Reservation,* 30 L.D. 515, and to irrigation (reclamation) projects, *Arid Land, etc.,* 32 L.D. 387; *E. C. Kinney,* 44 L.D. 580, 582. See also 1 Lindley, *Mines,* § 192 (3d ed. 1914). Similar rulings had been made, including by this Court, with respect to other types of possessory interests in federal lands, for example under the homestead laws. See, *e.g., Frisbie* v. *Whitney,* 9 Wall. 187; *The Yosemite Valley Case,* 15 Wall, 77, 89, 91; *Shiver* v. *United States,* 159 U.S. 491; *Russian-American Packing Co.* v. *United States,* 199 U.S. 570, 577, 578.

The latter cases are sometimes sought to be distinguished from mining claims on the ground that the mineral location constituted a particularly firm sort of property relation between the government and the locator.

See, *e.g.*, *Lindley, supra,* at 400. But while it has been repeatedly said, including by this Court in *Krushnic,* that a mining claim "is property in the fullest sense of that term," 280 U.S. at 316, such statements have usually been qualified by the observation that this is true only "so long as [the locator] complies with the provisions of the mining laws." *Id.* at 317; see also, *e.g.*, *Gwillim* v. *Donnellan,* 115 U.S. 45, 49 (a "valid *and subsisting* location of mineral lands, made *and kept up* in accordance with [the laws] * * *"; emphasis supplied).

Moreover this Court only rarely had occasion to address the issue where the government was the adverse claimant of the land. One prominent case in which it did have such an occasion—though not one involving the assessment work controversy—resulted in a statement which quite carefully erases any distinction between mining claims and other types of possessory rights over federal land in the withdrawal context:

> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. * * * [*Cameron* v. *United States, supra,* 252 U.S. at 460.]

See also *Black* v. *Elkhorn Mining Co.,* 163 U.S. 445, 450; *Union Oil Co.* v. *Smith,* 249 U.S. 337, 349; *Cole* v. *Ralph,* 252 U.S. 286, 295.

In fact, the rule regarding withdrawal of land encumbered by mining claims was not quite so simple although, as will be seen, the qualification does not affect the government's position in this case. Approaching the problem rather conceptually, the responsible officials considered that a withdrawal to create some national preserve could be accomplished in either of two ways: (1) the government could withdraw to public use only those lands within the described boundaries which were not subject to valid mining claims; (2) it could withdraw to public use *all* lands, but existing valid mining claims would be impressed with a possessory right in favor of the locator. In the first case, the lands would never become part of the public reservation and consequently would always be open to relocation by others; in the second, relocation was not possible, but the land could be drawn into the reservation if the original locator ever failed to keep it up. The difference between the two was said to depend on the wording used in creating the reservation; the

theory is fully set out, and examples are given, in *Navajo Indian Reservation, supra.*

What is important here is that no one ever suggested that locations might be immunized *both* from relocation *and* from government withdrawal in the event of lapse. The form and policy of the Mineral Leasing Act make quite clear that oil shale lands were withdrawn from relocation—the *only* exception to the requirement of leasing was for valid, existing claims *which were maintained.*

> Such being the case, [respondents'] claim that performance of assessment work is a matter of no concern to the Government comes to this: By the withdrawal all subsequent locations are barred, yet the Government may not take advantage of any default or abandonment of a claim during the existence of said withdrawal, no matter how complete the abandonment or how pressing the need for the land for public purpose. No reason exists, therefore, for the performance of the annual labor prescribed as necessary to maintain a right to possession; and the locator is, by the fact of the withdrawal, sheltered from the consequences of his failure to perform the work prescribed by the statute, and said statute is repealed as to lands so withdrawn. The entire lack of justification, either legal or equitable, for the result above indicated clearly demonstrates the fallacy of the claim * * *.

Interstate Oil Corp. et al., 50 L.D. 262, 266–267. See also, in addition to the cases cited above, *Cronberg* v. *Hazlett,* 51 L.D. 101; *Krushnic,* 52

L.D. 282, and 295; *United States* v. *Ruddock et al.*, 52 L.D. 313; *Standard Shales Prod. Co.*, 52 L.D. 522;[22] *Hodgson* v. *Midwest Oil Company*, 17 F.2d 71. We know of no decision to the contrary, and suggest that it is entirely possible that the Court would have ruled the other way in *Virginia-Colorado* had it been apprised of this background. For since unpatented and unperfected claims had always been subject to defeasance by the United States for want of assessment work when the land was withdrawn without possibility of relocation, the 1920 Mineral Leasing Act did not, in fact, change existing law.

This Court's decision in *Krushnic* held that the 1920 Act, alone, did not withdraw the land. Because a located claim on which assessment work has lapsed and which is therefore subject to relocation subsists until relocation during a period of lapse, the *Krushnic* Court apparently reasoned that government action of dignity at least equal to relocation was required before land subject to a claim could be withdrawn. But it is clear that the government need not behave in all respects as a private relocator would—for example, by going into a state court to settle any dispute over the right to possession. *Humboldt Mining, supra.* Nor could the government be required to wait, before making its claim, until some third party sought possession of the land, as for a lease or homestead. In the first

[22] Departmental decisions to the effect that the government had no interest in the performance of assessment work did not involve areas which had been withdrawn. *Re Wolenberg*, 29 L.D. 302, 304; *Nielson* v. *Champagne Min. & Mill. Co.*, 29 L.D. 491, 493.

place, such a holding would ignore the existence of public as well as private uses for the land; secondly, lessees and homesteaders derive their possessory rights from the government, and could have no greater claim than it does. Thus, whatever was missing in *Krushnic* was supplied by the time of *Virginia-Colorado,* when the government had proceeded individually against each claim during a period of assessment work lapse, and had withdrawn oil shale lands even from leasing, under undoubted statutory authority, in aid of its management of the public domain. To say that the claims nonetheless need not be worked to preserve their validity deprives the statute's maintenance clause of any meaning; for if the claims need not be worked to preserve them, it can be argued that even abandonment cannot be inferred from the fact that such work has not been done.[23]

B. THE BACKGROUND AND LEGISLATIVE HISTORY OF THE MINERAL LEASING ACT OF 1920 MAKE CLEAR THAT CONGRESS BELIEVED THE MAINTENANCE-OF-CLAIM PROVISION OF THE STATUTE WOULD REQUIRE DILIGENT WORKING OF CLAIMS.

The government's *Krushnic* brief as well as its *Virginia-Colorado* brief omitted almost entirely any mention of the legislative materials bearing on the meaning of what is now 30 U.S.C. 193:

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands

[23] See also p. 45 n. 18, *supra*. Of course, the government would be able to show abandonment where, as in some of the claims in this case, the original locators or their heirs have sold their interests to speculators for paltry sums. But that does not suffice to answer the cases where the original locators themselves claim patents, or the quitclaim deed passes for a higher price.

> valuable for such minerals * * * shall be subject to disposition *only* in the form and manner provided in this Act, *except as to valid claims* existent at date of the passage of this Act and thereafter *maintained in compliance with the laws under which initiated,* which claims may be perfected under such laws, including discovery. (41 Stat. 451; emphasis supplied.)

Also unnoted was the existence of an alternative mode of preserving existing claims:

> [A]ny person having a valid claim to [oil shale] under existing laws on January 1, 1919, shall, upon the relinquishment of such claim, be entitled to a lease under the provisions of this section for such area of the land relinquished as shall not exceed the maximum area authorized by this section to be leased to an individual or corporation. [41 Stat. 446].

Both the legislative materials, and the optional choice, indicate clearly that Congress contemplated that claimants to minerals affected by the Act, including oil shale, would *with dispatch* either convert their holdings to lease, if permitted, or reduce them to patent. It never considered that they would be able simply to sit on their rights, enshrouding the public domain for years with cloud and uncertainty, without in any material way encouraging development of public resources or the public domain.

1. The legislative materials

The starting point for discussion of the legislative materials is the observation that the oil shale problem was a very small part of the context out of which the

Mineral Leasing Act of 1920 arose. Pressure for that Act began in the first decade of the century when the President withdrew from location coal, oil, and phosphate bearing lands, and the first bills introduced made no mention of oil shale. By the time oil shale was brought within the coverage of the proposed Act, the maintenance-of-claim provision—which applies to *all* minerals under the Act—had already taken its basic shape. In particular, debate and discussion focussed on the issue which had engaged attention since the President's withdrawal from location of all known public oil lands in 1909: whether persons in the course of drilling, but who had not yet discovered oil, were entitled to continue their search after withdrawal, and under what conditions.

So far as we have been able to determine, the first inclusion of oil shale in the leasing bills which led to the 1920 Act was in the House substitute for S. 2812 of the 65th Congress, Second Session—a bill which was before the Congress in 1918 and failed through filibuster in the Senate at the end of the Congress. In the Senate, the bill had dealt only with coal, phosphate, oil, gas, potassium and sodium, 56 Cong. Rec. 384 (1917); in considering the withdrawals of public lands which had already occurred, the Senate was apprised that 56 million acres of public land had been withdrawn from location, including 45 million for coal and over 6 million for oil, but only 132,000 acres for oil shale (*id.*, 389).

House Report No. 563, 65th Cong., 2d Sess. (1918) proposed adding oil shale to the list of minerals, and provided

> That any person having a valid location to [oil shale] under existing laws on January first, nineteen hundred and eighteen, shall, upon the relinquishment of such location, be entitled to a lease * * * [at 5].

Although the House provision also provided for a saving clause as to valid claims for any mineral affected by the bill which were "maintained in compliance with the laws under which initiated," at 8, no mention of that clause was made in discussing the treatment of oil shale; the Committee remarked only that

> There are reported to be numerous locations upon these lands under the general placer mining laws and provision has been adopted that any person having a valid location of such minerals prior to January 1, 1918, *may, upon relinquishing his claim, be entitled to a lease* under the provisions of the section. [At 18; emphasis supplied].

The reason for not mentioning the possibility of patent is clear. Discussions of the saving clause were permeated with the understanding that diligence would be required in maintaining any claim thus saved, *e.g.*, 56 Cong. Rec. 487–488, 563–578 (Senate); 7034, 7104 (House), and the House well knew that commercial use of oil shale—and hence commercial development of oil shale locations—was years away. H.Rep. No. 563, *supra*, at 18.

Except for oil shale, of course, there was no real problem about diligence once a discovery was made of minerals subject to the act; they all had substantial present value. In the years before 1918, the often fierce debates over the leasing bills and their saving

clauses centered on the individual who was drilling for oil but had not yet discovered it. Beginning with the Act of 1910 authorizing Presidential withdrawals, (45 Cong. Rec. 8667–8672 (1910)) through H.R. 16136 of the Sixty-Third Congress (51 Cong. Rec. 15295–15297, 15424–15425 (1914); 52 Cong. Rec. 5154–5155 (1915)), and H.R. 406 of the Sixty-Fourth Congress, (S.Rep. No. 319, 64th Cong., 1st Sess. 3–6, 53 Cong. Rec. 1092–1095 (1916)), the emphasis was on their plight and the need for them to be diligent in working thier claim in order to qualify for relief.[24] This familiar proposition readily carried forward into the discussion of the 1918 bill.

When the Sixty-Sixth Congress came to debate the Leasing Bill, S. 2775, everyone was familiar with what had gone before—the bill introduced was identical with S. 2812, *supra,* and there was no Senate Report. 58 Cong. Rec. 3886 (1919). The Senate had always been the focus of resistance to leasing, and a stronghold of the pressure to protect the interests of those who were on the public lands drilling for oil. The debates there, again, talked of the Act and its saving

[24] By the act, as now reported, it is provided in substance that those who had entered and, prior to any withdrawal, had done a substantial amount of work, and who have since developed their claims with reasonable diligence and discovered oil, shall receive patents. That those who entered after the first presidential order of withdrawal, but prior to the [1910 Act] and the further withdrawals thereunder, shall receive preferential leases * * *.

In no instances are patents or leases provided for except where the location or claim has been developed and discovery of oil has been or shall be made therein. [S. Rep. No. 319, *supra*, at 5.]

provision almost entirely in terms of those interests; and the amendment made of the latter, to insert the words "including discovery" at its end, was to assure that they would be protected. 58 Cong. Rec. 4111-4112, 4443–4444, 4577–4584, 4770–4771 (1919). It is clear, again, that Congress was not considering or proposing the adoption of a system under which persons could make a location based on a common, presently unusable rock and then simply hold it, without investment or development,[25] for decade after decade, until its value could be realized. The mining laws had never been adopted to that speculative end. "The entire lack of justification, either legal or equitable, for [that] result * * * clearly demonstrates the fallacy of the claim * * *." *Interstate Oil Corp. et al., supra*, 50 L.D. at 267.

2. The factor of choice

A structural consideration points to the same conclusion. Congress gave oil shale placer claimants who had established claims before January 1, 1919 a choice—they could maintain their claims under the savings clause *or* they could trade their claims in on a lease. That lease could be for an indeterminate period and—particularly important here—the Secretary was authorized to "encourag[e] the production of petroleum products" from shales by "waiv[ing] the pay-

[25] Such assessment work as was ever done on oil shale claims rarely looked to its commercial development. Rather, locators made random, shallow trenches in the earth, to whatever extent appeared necessary to justify the assertion that the work had been done. See, *e.g.*, App. 166–174, 251–253.

ment of any rental or royalty not exceeding the first five years of any lease." 41 Stat. 446. Thus, under the lease, there would be a five year period during which the lessee would be freed from any obligations of financial expenditure in the maintenance of his claim. That respite would be valuable—and a lease desirable over a location—only if a claim would otherwise have to be worked. And it is plain that changing the pattern of exploitation of the minerals subject to the act from a patent system to a leasing system was the purpose of those who worked for enactment of the bills. That they would have wished such an encouragement to switch to leases cannot be doubted.[25] That they would have permitted only five years of unproductive landholding under a lease, but (to date) fifty years of unproductive landholding under the existing locations is incomprehensible, and deprives of any meaning the requirement that the claims be "maintained."

We do not discuss in this brief whether the Secretary initially, mistakenly interpreted *Virginia-Colorado* as having ruled that he lacked subject-matter jurisdiction over the assessment work cases, or what the effect of such an interpretation would be on his present ability to give effect to those cancellations which were proper as to service and process and which became final before the decision in that case. As respondents observed in opposing certiorari, that issue is not here. Nor do we address the several efforts he made to secure legislative relief from some of the effects of *Virginia-Colorado* in following years (*e.g.*,

[25] Similar inducements were made regarding oil prospectors, *id.* at 443, 445.

App. 68, 114, 213). While it would be impossible to deny that patents have been granted despite such cancellations and that the legislative efforts failed, neither can we conceive that the mistakes which may have been made forfeited for all time government interests in this vast, valuable, and as-yet undeveloped portion of the public domain to speculators and others who may be able to forge some more-or-less tenuous link to the original locators of half a century ago. *United States* v. *California,* 332 U.S. 19, 39–40; *United States* v. *San Francisco,* 310 U.S. 16, 31–32.

Indeed, it was the error of *Virginia-Colorado,* which we hope we have shown above, which to a substantial degree fathered the legislative failures. Viewed against the mining laws as a whole, that opinion made it appear that the locations before 1920 had created a vested property interest which could not be cut back without raising serious questions whether property had been taken without compensation. In such a situation, legislative overruling could not readily be expected; the more effective remedy would be for this Court to rule, as we believe we have shown to be the case, that its reading of the statute in *Virginia-Colorado* was mistaken, and that no such interest ever existed.

In the end, the issue comes down to whether the mining laws are to be applied to sanction what is and has been basically speculation in highly attenuated interests in land. The lands here, purportedly located as valuable for oil shale before 1920, have never been used for the commercial manufacture of oil from shale. The ~~only~~ economic use of them of which we

2 principal

are aware is that for a time some locators sought to use or lease the located lands for grazing livestock—an abuse which the Department soon stopped (App. 225-227). The mining acts were never meant for such a purpose. They were adopted to promote the development of the nation's mineral lands. When that development is not carried forward in even the minimal degree the assessment work provisions stipulate and the nation needs the land for a specific public purpose, it is entirely appropriate and permissible under the statutes for it to take it back. As we have shown, that principle was firmly established when the Leasing Act was enacted, and enactment of that law did not suspend the operation of the principle for the lands here involved.

CONCLUSION

The opinion of the United States Court of Appeals for the Tenth Circuit should be reversed. If necessary, the opinion of this Court in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, should be limited, or overruled.

Respectfully submitted.

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TABLE OF CONTENTS

	Page
APPENDIX A—General History of Oil Shale Lands	1
I. The Pre-1920 Period	1
A. Classification of Oil Shale Lands	1
B. Naval Oil Shale Reserves	3
C. The Location of Oil Shale Claims	5
II. The 1920-1930 Period	9
A. The Mineral Leasing Act of February 25, 1920	9
B. Investigation and Determination of Validity of Oil Shale Claims	13
C. The Pre-Krushnic Assessment Work Contests	15
D. The Krushnic Court Review	21
III. The 1930-1945 Period	24
A. The Post-Krushnic Assessment Work Contests	24
B. The General Withdrawal of Oil Shale Lands	26
C. The Indian Lands	29
D. The Taylor Grazing Act	34
E. The *Ickes* Decision	35
F. Action Subsequent to the *Ickes* Decision	38
G. Interest in Oil Shale	40
IV. The 1945-1960 Period	41
A. The Synthetic Liquid Fuels Act	41
B. The Multiple Mineral Development Act of 1954	47
C. The Interest in Oil Shale	49
V. The 1960-1964 Period	54
A. The Interest in Oil Shale	54
B. The *Res Judicata* Decisions	54
C. The April 17, 1964 Instructions	56

Page

APPENDIX B—The Title History 59

I. The Bute Nos. 1 through 48 59

II. The Atlas Nos. 1 through 18 69

III. The Camp Bird Nos. 1 through 20 75

IV. The Carbon Nos. 1 through 8 and the Elizabeth Nos. 1 through 12 81

V. The Southwest, Northwest, Northeast and Southeast Claims 89

VI. The Oyler Nos. 1 through 4 93

VII. Summary 102

APPENDIX C—The Assessment Work Contest Proceedings 109

I. Contest 11757—Bute Nos. 1 through 48 Claims 109

II. Contest 11759—Atlas Nos. 1 through 18 claims 116

III. Contest 11761—Camp Bird Nos. 1 through 20 Claims 122

IV. Contest 12029—Carbon Nos. 1 through 4 and Elizabeth J. Nos. 1 through 12 Claims 128

V. Contest 12972—Northwest, Northeast, Southeast and Southwest Claims 134

VI. Contest 12039—The Oyler Nos. 1 through 4 Claims 139

VII. Summary 146

APPENDIX D—History of the Specific Lands Embraced by the Oil Shale Claims in Question 152

I. The Bute Nos. 1 through 19, 21 through 28, and 30 through 48 152

II. The Atlas Nos. 1, 2, 3, 7, 9, 10, 12, 17, 18 157

Appendix D—Continued Page

III. The Camp Bird Nos. 1 through 20 163

IV. The Carbon Nos. 1 through 5 and the Elizabeth Nos. 1, 2 and 4 through 12 167

V. The Northwest, the Northeast and the Southeast Claims 171

VI. The Oiler Nos. 1 through 4 173

VII. Summary 175

APPENDIX A

General History of Oil Shale Lands

I. The Pre-1920 Period

A. *Classifications of Oil Shale Lands*

By three letters dated May 23, 1916 (Exhibit N), addressed to the Commissioner of the General Land Office, the Director of the Geological Survey stated with respect to lands in Colorado, Utah and Wyoming:

> During the field seasons for 1913, 1914 and 1915, reconnaissance examination in this region was actively carried forward, and it was demonstrated that over wide areas oil shale are present which average higher in petroleum content than those commercially worked in other countries. The average shale tested within the area examined yields more than one-half barrel of crude oil per short ton of rock and a yield of one barrel per ton is not uncommon.
>
> The net result of oil shale investigations already made is that the oil-shale areas in Colorado, Utah and Wyoming constitute a latent petroleum reserve whose possible yield is several times the estimated total remaining supply of petroleum in the United States.
>
> In view of the high prospective mineral value of lands underlain by oil-shale deposits it is, of course, apparent that they should not be permitted to be acquired under the non-mineral land laws. The lands have not been recommended for withdrawal because the oil-shale industry is not yet developed in the United States, and as it is

> desired to give opportunity for the establishment of experimental plants, it is believed the lands should remain open for the present to acquisition under the mineral-land laws, even though they are ambiguous and but poorly adapted to deposits of this type.
>
> Accordingly, I hereby classify the tracts listed below as mineral lands, valuable as a source of petroleum and nitrogen, and request that you make the proper notation of the classification upon your records: [1]

The above-quoted paragraphs were followed, by a detailed description of the lands in the States of Colorado, Utah and Wyoming classified as mineral in character prospectively valuable as a source of pe-

---

[1] In Bulletin 641-F entitled "Oil Shale in Northwestern Colorado and Adjacent Areas" published by the United States Geological Survey December 18, 1916, the following appears:

> For several years it has been known that some of the shale of the Green River formation in northwestern Colorado and northwestern Utah would produce oil when subjected to destructive distillation, but the yield of petroleum from the oil fields was so great that production by distillation did not seem to be feasible, despite the fact that in Scotland such an industry has long been developed and is today paying dividends on a large investment.
>
> The United States Geological Survey has regarded this oil shale as a great reserve—an undeveloped resource—and one that would be developed as soon as the demand for petroleum greatly exceeded the supply. In anticipation of such an event, E. G. Woodruff and David T. Day began, in 1913, an examination of the Green River formation in Colorado and Utah and made rough field tests to determine the richness of the shale. Although these tests were not entirely satisfactory, they tended to confirm the general impression that this shale constitutes a source of oil which, sooner or later, will be called into use. . . .

troleum and nitrogen, because of their oil shale content. The three classification letters of May 23, 1916 have, over the years, been modified from time to time as more detailed examinations of the lands in those states have either discovered more oil shale lands, or have established that some of the lands previously classified as prospectively valuable for oil shale were, in fact, not prospectively valuable for this material (Exhibit N).

The classifications did not close the lands to entry and acquisition under the non-mineral land laws if there was an appropriate reservation of the oil shale to the United States under the Act of July 17, 1914, 38 Stat. 509, *et seq.*, 30 U.S.C. 121 *et seq.*, or a reservation of all minerals under the Stock-Raising Homestead Act of December 29, 1916, 39 Stat. 862 *et seq.*, 43 U.S.C. 291 *et seq.*

B. *Naval Oil Shale Reserves*

Because of an ill-founded presumption that the oil resources of the United States might be on the verge of complete depletion, action was taken to set aside certain public lands known or thought to contain petroleum for the use and benefit of the United States Navy. Among the lands set aside were some of the oil shale lands of the Piceance Creek basin area in northwestern Colorado. On December 6, 1916, the "Naval Oil Shale Reserve No. 1, Colorado No. 1," was withdrawn from entry under the public land and mineral laws (Exhibit O). A portion of this withdrawal order reads as follows:

> It is hereby ordered that all lands included in the following list shall hereafter constitute Naval Oil Shale Reserve No. 1, Colorado No. 1, and shall be held for the exclusive use or benefit of

> the United States Navy until this order is revoked by the President or by Congress.

A Presidential order of September 27, 1924 withdrew lands for "Naval Oil Shale Reserve No. 3, Colorado No. 2" (Exhibit O). This order reads, in part, as follows:

> It is hereby ordered that, subject to any valid existing claim and in so far as title thereto remains in the United States, the lands hereinafter described be, and the same are hereby, withdrawn from settlement, location, sale, or entry, and held for the exclusive use and benefit of the United States Navy, for the development of Naval Oil Shale Reserve No. 1, Colorado No. 1, until this order is revoked by the President or by Congress.

Although the order of September 27, 1924, is more explicit as to the extent and effect of the withdrawal, both orders had the same scope. That is, both orders withdrew from entry under either the agricultural or mining laws of the United States the lands described in them, and excepted from both were valid existing claims to the land, such as mining claims which had been validated by proper discoveries under the mining laws.

The Naval Oil Shale Reserve Nos. 1 and 3, situated in the southeast corner of the Piceance Creek basin area (the area shaded red on the map in Exhibit P) and a similar Naval Oil Shale Reserve in Utah were originally administered by the Department of the Navy. By the Executive Order of May 31, 1921 (No. 3474), the administration of these reserves was committed to the Secretary of the Interior. This Order was, however, revoked by the Executive order of March 17, 1927 (No. 4614), and all

three reserves have since been administered by the Department of the Navy (Exhibit O).[2]

C. *The Location of Oil Shale Claims*

Although some oil shale claims were located before 1916, it is believed that the vast majority of the oil shale claims were located from 1916 to February 25, 1920.[3] During this four-year period, location notices were recorded in various county recorder's offices in Colorado, Utah and Wyoming for thousands of oil shale claims plastered over millions of acres of public land. The exact number of such claims located before the passage of the Mineral Leasing Act of February 25, 1920 is not known inasmuch as there was no requirement that the locators advise the United States of the fact that they were asserting rights to the public lands. Some idea of the magnitude of the location activity can be gathered from the following statement made by the Secretary of the Interior (Exhibit 6):

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[2] In *United States* v. *Pan-American Petroleum Company*, 55 F.2d 753, the court held that the attempted transfer of the administration of the Naval Petroleum and oil shale reserves to the Secretary of the Interior was invalid and that leases signed by E. C. Finney as Assistant Secretary of the Interior covering the nations oil reserves had been executed without authority.

[3] In Bulletin 210 entitled "Oil-Shale—An Historical, Technical, and Economic Study" published in 1922 by the United States Bureau of Mines, the following appears:

> In 1914, Woodruff and Day published the result of an investigation of the oil-shales of the Green River formation in Colorado. That a mineral, from which oil could be obtained by destructive distillation, existed in parts of Colorado, Utah, and Wyoming, was well known; but this report, followed by those of Winchester, which have been widely quoted, gave rise to a remarkable interest in oil-shale in the United States during 1916. . . .

> . . . An examination was made by the General Land Office in the years between 1920 and 1930 to determine the status of the oil shale placer mining claims on and about the Green River shale formation in Colorado, Wyoming, and Utah. That examination disclosed that more than 30,000 such claims, embracing more than 4,000,000 acres of the public domain, were not being maintained by the performance of annual assessment work.

As a general rule, each of the recorded location certificates declared that eight persons had located a claim embracing 160 acres of public land by marking its exterior boundaries on the ground and by discovering within its limits a valuable mineral deposit. It would appear to have been an extremely unusual situation to locate a claim with less than eight names and covering less than 160 acres of land. One individual could locate a claim covering only 20 acres, but with the addition of names, up to a limit of eight, 20 acres could be added for each name. The annual assessment work of $100.00 per claim was the same whether the claim covered 160 acres or only 20 acres.

Physically marking the boundaries of a 160-acre claim on the rugged terrain covering most of the oil shale lands was, of course, no easy task. Remarkably, however, an examination of the recorded location notices listed in the abstracts of title introduced as evidence in these consolidated cases (Exhibit 259) reveals that the locators alleged they had accomplished this task, as well as the task of making a discovery of oil shale for each claim, on many such claims within a relatively short period of time. For example, the Atlas Nos. 1 through 18 claims, comprising approximately 2,800 acres, were allegedly located

in five days in the period of time beginning December 26 and ending December 31, 1919. The Bute Nos. 1 through 48 claims, comprising some 7,680 acres, were allegedly located in 13 days in the period of time beginning December 17, 1919 and ending January 2, 1920. The Tom Boy Nos. 1 through 12 claims, embracing about 1,920 acres, were allegedly located in the four-day period beginning January 12 and ending January 15, 1920. The Camp Bird Nos. 1 through 20 claims, totalling approximately 3,200 acres, were allegedly located in five days in the period of time beginning January 2, and ending January 7, 1920. And the Liberty Bell Nos. 1 through 12 claims, comprising 1,920 acres, were purportedly located in the four-day period beginning December 16 and ending December 19, 1919. Thus, 110 claims, embracing approximately 17,600 acres, were allegedly located during a 31-day mid-winter period of time beginning December 17, 1919 and ending January 15, 1920.

Steven A. Post's name appears as a locator of 102 of the 110 claims named above. Charley Anderson is named on 87 of the location certificates. J. C. Moore's name appears as a locator of 79 of the claims, while W. S. Furman and Ethel McGahen are each named on 59 location certificates. Emma J. Boyd's name appears as a locator of 48 claims and none of the persons named in the location certificates for the above-identified claims appear as locator of less than 12 of the claims.[4]

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[4] It is not known whether the locators of the Atlas, Bute, Camp Bird, Liberty Bell and Tom Boy claims were also named as locators for other claims that were allegedly located during the same 31-day period of time. It appears, however, that Stephen A. Post and others of the locators, also participated

It does not appear that any of the claims were located with the thought that the lands were presently valuable for mining purposes, i.e., that one would be justified in spending his time and money in extracting the oil shale (that was readily apparent in the cliff faces over hundreds of miles of area) and placing the oil shale, or products therefrom, in the market. It is possible that some of the claims were located with a bona fide intent to spend time and money, not in developing the property for mining purposes, but in an effort to ascertain whether the oil shale (which was of exceedingly widespread occurrence) might justify the development of a mining property. There seems to be little question that the great majority of the claims were located not for mining purposes, but for purposes of speculation, with the hope that at sometime the claims might be disposed of at a profit. Certainly no one held the opinion that millions of acres of oil shale lands could be mined at a profit.[8]

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in the location of the Two Gems claims and the Coscora claims (Exhibit RR—contest docket sheets for contests 11744 and 11746).

[8] In Bulletin No. 8 entitled "The Oil Shales of Northwestern Colorado" published in 1919 by the State of Colorado Bureau of Mines, the following statements were made:

> It is reported that some oil-shale claims have been sold at prices ranging from $5.00 to $30.00 per acre. In this connection it must be remembered that oil-shale lands at present, have little intrinsic value. They may be compared to limestone, clay or gravel deposits which are valuable only when favorably located. If they are far from markets or off the lines of easy transportation, they are worth practically nothing. Oil shale can have no commercial value until plants are constructed to convert it into saleable products, and consequently shale lands are valuable only as sources of raw material in connection

II. The 1920-1930 Period

A. *The Mineral Leasing Act of February 25, 1920*

In 1909 the Director of the Geological Survey reported to the Secretary of the Interior that the oil lands of the west were passing into private ownership so rapidly that within a short time, a matter of months, the public supply of oil would be exhausted and the Government would thereafter be forced to buy its supply from private industry. As a result, President Taft issued, on September 27, 1909, the first withdrawal of petroleum lands, a withdrawal which included over three million acres in California and Wyoming. This and other withdrawals were later ratified by the Congress with the passage of the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141-143, known commonly as the Picket Act. As amended in 1912, 37 Stat. 497, the Picket Act provided that lands withdrawn under its authority "shall at all times be open to exploration, discovery, occupation, and purchase under the mining law . . . so far as the same apply to metalliferous minerals. . . ."

During the ten-year period following the withdrawal of the petroleum lands numerous bills were introduced in Congress for the purpose of disposing of the nonmetalliferous minerals withdrawn under the authority of the Picket Act. It was not until August 1919, however, that Senator Smoot introduced a bill that ultimately received approval of the Committee on Public Lands, and, after much debate, was enacted by Congress. It became effective February 25, 1920. This act made land valuable for coal, phos-

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with such plants. Those nearest the railroads will probably be exploited within the next few years, while those remote from transportation and water supply will have only an indefinite prospective value for a long period.

phate, oil, oil shale,[5] gas and sodium exclusively leasable.[7]

The Mineral Leasing Act was "the expression of a new policy for the disposition of public lands open to exploration or entry, by lease, instead of by complete alienation."[8] The act provided, among other things, for (1) rentals, royalties and bonuses in favor of the United States,[9] (2) acreage limitations on the amount of land that could be held under lease, (3) the continuing control and supervision over the use and disposition of the surface of the lands by the Department of the Interior, and (4) the continuing control and supervision over the development of the mineral resources by the Interior Department. The act was a complete change from the philosophy of the mining laws that permitted (1) the unlimited location of mining claims simply by recording a location certificate in the county records, (2) the free use and occupation of the lands for mining purposes without any control or supervision, and (3) the acquisition of the complete fee title by the payment of $2.50 per

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[5] The bill as introduced did not specifically refer to oil shale. This was added in Committee. See House Report No. 398, 66th Cong. 1st Sess., October 21, 1919.

[7] For a more detailed discussion of the above, see American Law of Mining, Vol. 1, Sections 1.24 through 1.28.

[8] *West* v. *Work*, 11 F.2d 828, 831.

[9] Section 35 of the act, 30 U.S.C. 191, provided, as it does today, that 10 per cent of all money received from sales, bonuses, royalties, and rentals shall be paid into the Treasury of the United States and credited to miscellaneous receipts, that 37½ per cent of all money received shall be paid to the state within the boundaries of which the leased lands or deposits are located, and that 52½ percent of all money received shall be paid into, reserved, and appropriated as a part of the reclamation fund created under the reclamation laws.

acre for a placer claim if a mining claimant desired to obtain a patent rather than simply work the claim, exhaust the minerals and abandon the land.

Section 37 of the act, 30 U.S.C. 193, reads in part as follows:

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals . . . shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

This section of the act provided (1) that with one exception deposits of leasing act minerals would be subject to disposition only under the terms of the act, (2) that such deposits could be acquired under valid mining claims existing on the date of the act and thereafter maintained in compliance with the laws under which initiated, and (3) claims existing on the date of the act could be perfected by diligent prosecution of work leading to a discovery.

The following legislative history sheds some light on the provisions of Section 37 of the act:

> Hearings on H.R. 3232 and S. 2812 before the House Committee on Public Lands, 65th Congress, 2d Session (1918), page 538:
>
> "MR. LENROOT. But you recognize that this bill in itself is withdrawal?
>
> "MR. SCHUYLER. Yes. Now that is where we come in to the point. If you are going to put in the theory of withdrawal, it cuts him off immediately, except to the extent

that he is working up on the claim diligently.

"MR. LENROOT. And that is the effect, is it not?

"MR. SCHUYLER. That is the effect.

"MR. LENROOT. The assertion of an adverse claim. And if a locator can not maintain himself upon such an assertion—could not maintain himself against a stranger if a stranger chose to enter the land—why should he have any right to be considered as against the Government, except to the extent of a preferential right to list? . . . Now, shouldn't the Government have the same right that a stranger has in asserting adverse claims?"

Debates on H.R. 3232 and S. 2812 on the floor of the House (1920), 59 Cong. Rec. 4581, Representative Lenroot:

"Under the Senator's amendment, consider this kind of case: A locator went upon land six months ago in good faith and proceeded for three months in good faith. He still is in good faith, but has not the money to develop and go further, and work has been suspended upon that location for three months. He is still in possession; it has not been withdrawn; no one else has asserted possession. The Senator's amendment would permit that man, when he had no valid claim because of the suspension of work, to begin work and proceed to patent. That is not the theory of the bill."

Hearings on H.R. 3232 and S. 2812 before the House Committee on Public Lands, 65th Congress, 2d Session (1918), page 602:

> "Mr. Lenroot. If I may make this suggestion, speaking as one member of the committee. I wish to say that in section 31 I had in mind protecting exactly the same rights that were protected by the circuit court of appeals alone in the Consolidated Mutual case,[10] but no more. If you think that section 31 does not do that, I would be very glad to have you propose an amendment to section 31."

B. *Investigation and Determination of Validity of Oil Shale Claims*

Concern over the status of the lands set aside for the Naval Oil Shale reserves led to an investigation of oil shale claims. It was soon discovered that while there were on file in various county recorder's offices thousands of location certificates for oil shale claims, little or no work was being done on the ground for the purpose of developing the claims. The responsible officials within the Department of the Interior decided to take some action to clear these "paper locations" from the public domain in order to facilitate and insure the proper operation of the Mineral Leasing Act.

The position of the Department of the Interior is shown by the following language in *The Federal Shale Oil Company* decision, 53 I.D. 213, 216:

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[10] In *Consolidated Mutual Oil Co.* v. *United States* (1917) 245 Fed. 521, the court held that a mining claimant in possession and in diligent prosecution of work leading to a discovery was protected even though no discovery had as yet been made at the time of a withdrawal of the lands from appropriation under the mining laws.

Counsel for appellant in their brief contend that the rulings in *Clipper Mining Co.* v. *Eli Mining Company* (194 U.S. 220), and *Cameron* v. *United States* (252 U.S. 450), upholding the jurisdiction of the department to determine the validity of mining claims for which no patent had been sought, do not apply for the reasons that the claims in both of those cases were in territory "previously withdrawn from exploration and purchase." The premise can not be admitted that the territory containing oil shale lands was not withdrawn from exploration and purchase under the mining laws. By the leasing act such lands were excluded from the operation of the general mining law and the oil shale deposits reserved for disposition only as therein provided, except "valid claims." Full power was given the Secretary to administer that act, and clearly in its administration it would be his duty to determine what lands are subject to lease, and what lands are within the exception of valid claims, as much so as it was to determine what lands were "valid claims" within the exception in the Monument Reserve in the *Cameron case*. . . . The public interest dictates that the facts bearing upon such inquiry should be ascertained and established when the evidence is available, and not postponed to await the day now apparently remote and unpredictable, when mining operations to extract oil shale have become economically practical and profitable, and rights under the leasing act would be invoked by persons wishing to avail themselves of its provisions, but when in all probability the question of whether a particular tract of land was within the purview of the act or within the exception of valid claims

would be difficult to resolve correctly because of the obliteration or effacement of evidence by lapse of time, and spurious claims would have to be permitted to stand for lack of evidence to establish their invalidity.

It was concluded that each claim would be examined and that, if the results of the examination warranted it, the claims would be challenged. As a result, the boundaries of thousands of claims were determined and each claim was examined for compliance with the mining laws. Where the examination showed failure to comply, a contest was initiated. Fraud in the location, lack of discovery, abandonment and failure to perform annual assessment work were found to be present, with a failure to perform annual assessment work the most frequent charge in the resulting contests.

Through the ensuing years it became apparent that considerable trouble and inconvenience could be avoided with a consequent savings in time and effort if the claims were contested solely on the grounds of a default in the performance of annual assessment work. For example, the Secretary of the Interior advised the Secretary of the Navy as follows (Exhibit A—letter dated August 8, 1931):

> If this charge [default in assessment work] is not denied by the claimants, or, if after answer is filed, the charge is proven at a hearing, the claims will be declared null and void, and there will be no necessity for attacking the claims on other grounds.

C. *The Pre-Krushnic Assessment Work Contests*

The Department's conclusion that an oil shale claim became invalid by a failure to perform the annual

assessment work was based on the provisions of Section 37 of the Mineral Leasing Act which withdrew lands valuable for oil shale from disposition under the mining laws except as to valid existing claims "maintained in compliance with the laws under which initiated."

The Department's position is set forth in the following excerpts from the decision in Emil L. Krushnic (On Rehearing) 52 L.D. 295, 300-301 (1929):

> In view of these well-settled constructions of the mining laws, which Congress may be presumed to have known when the leasing act was passed, there would seem to be no doubt that to maintain a claim in compliance with the laws under which initiated necessarily meant the performance of the requirements of annual labor, and that there was no other intent or purpose in the use of such words than to protect and preserve only claims where the possessory rights had been maintained. As between the Government and the claimant the test of the validity of the latter's claim is found in the provisions of section 37, and not that part of section 2324, Revised Statutes, which defines his rights with respect to some stranger who seeks to relocate the claim.
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> * * * *
>
> When the original locators failed to maintain the claim by doing the annual assessment work within the period prescribed by law, all their rights against the Government in and to this location upon oil shale lands were extinguished. . . . The foregoing view finds strong support in a recent decision of the Circuit Court of Appeals for the 8th Circuit in the case of *Hodgson* v. *Midwest Oil Company* (17 Fed. (2d) 71),

where it was held that the failure to do the assessment work for 1921 upon an oil placer claim located in 1887 on lands included in a petroleum withdrawal made in 1909, terminated all possessory rights thereto.

* * * *

> It is contrary to the declared purpose and object of the act to assume that in doing away with the system of a free grant of the minerals and the grant of a fee title it was intended to preserve all the rights of a mining locator and at the same time relieve him of his duties, for that is the consequence if neither the Government nor an individual can now take advantage of his default. The fair and obvious meaning of section 37 is that if the annual work is not done, all the rights of the claimant are gone. . . .

A search of the 10-year legislative history of the Mineral Leasing Act does not reveal any specific intent or purpose on the part of Congress in providing that the leasing act minerals should not be subject to disposition under the mining laws except as to valid existing claims "maintained in compliance with the laws under which initiated" with the exception of the conclusions that might be drawn from the legislative history previously set forth in the discussion of Section 37 of the Mineral Leasing Act.

It is not surprising that the legislative history is for the most part silent as to the purpose and requirements of Section 37 of the Mineral Leasing Act. The purpose and wording is abundantly clear and would require no particular discussion or explanation. How could a mining claim be "maintained in compliance with the law under which initiated" other than by the performance of annual assessment work?

Actually Congress by withdrawing the leasing act minerals from disposition under the mining laws, and in addition providing for the continued maintenance of claims in compliance with the law under which initated, gave the Department of the Interior an even stronger basis for declaring claims null and void than had previously existed and been employed in the past by the Department. In a 1916 decision involving the validity of a mining claim covering lands included within a withdrawal under the reclamation act for irrigation works, the Department stated:

> This is undoubtedly the true rule, for where a claimant is in default so that his claim could be defeated by another individual adverse claimant, surely the Government, desiring to devote the land to an important public use, may likewise take advantage of the default and divest the claim so as to free the land for Government use. (*E. C. Kinney*, 44 L.D. 580)

In other words, in the 1916 decision the Department construed the law as requiring the maintenance of a claim by the performance of annual assessment work as a condition subsequent to its continuing validity, and if the claim was not so maintained, it could be defeated by an intervening withdrawal of the lands.

It would certainly seem that Section 37 of the Mineral Leasing Act in going beyond a simple withdrawal of the lands and specifically providing for the continued maintenance of claims at least impliedly recognized the Department of the Interior's construction of the law in the *Kinney* decision.

The Department's conclusion that a mining claim became invalid if it was not maintained by the performance of annual assessment work as a result of

the Congressional withdrawal accomplished by the Mineral Leasing Act was reinforced by the decision by what is now the Tenth Circuit Court of Appeals in *Hodgson* v. *Midwest Oil Company*, 17 F.2d 71 (8 Cir. 1927), cited and relied upon by the Department in its *Krushnic* decision, *supra*. In the *Hodgson* case, the court held that a failure to perform annual assessment work for an oil placer claim, located before the 1909 petroleum withdrawal, terminated the claimant's right to the lands, and that the mining claimants could not, for this reason, eject persons entering the lands under the authority of an oil and gas lease issued pursuant to the Mineral Leasing Act of February 25, 1920. This conclusion was based on the opinion of Mr. Justice Pitney in *Union Oil Company* v. *Smith*, 249 U.S. 337 (1919), much of which was quoted by the Circuit Court. A portion of the quoted excerpt, from pages 349 and 350, reads:

> Actual and continuous occupation of a valid mining location based upon discovery is not essential to the preservation of the possessory right. The right is lost only by abandonment, as by nonperformance of the annual labor required by section 2324.
>
> * * * *
>
> And it is important to observe that in these acts of Congress, as in the practice of miners, "assessment work" had nothing to do with locating or holding a claim before discovery. On the contrary it was the condition subsequent prescribed by Congress to be performed in order to preserve the exclusive right to the possession of a valid mineral land location upon which discovery had been made.

Based upon Mr. Justice Pitney's reasoning, the Circuit Court held as follows, at pages 76-77:

> From the foregoing it is clear that such original locator and his assigns was required as a condition subsequent to do the so-called "assessment work" periodically, and, upon failure to do during any interval fixed by law, all possessory rights terminated. Ordinarily, and in the absence of any withdrawal, the locator would have the right to relocate, equally only, however, to any other person qualified to locate.

In view of (1) the past administrative practice evidenced by the Kinney decision, *supra*, and followed in *Interstate Oil Corporation et al.*, 50 L.D. 262, (2) the language of the court in the *Hodgson* case, *supra*, and (3) the plain and unambiguous wording of Section 37 of the Mineral Leasing Act, it seems obvious that there was ample legal argument to support the conclusion that the Department not only could declare claims invalid where they were not being "maintained" by the performance of assessment work but that it had a clear duty to do so.

How could the Department of the Interior, charged with the duty and responsibility of administering the public lands and effectuating the purposes of the Mineral Leasing Act, sit idly by and ignore the thousands of claims plastered over millions of acres that were not being "maintained" by the performance of annual assessment work, when Congress had specifically directed that the leasing act minerals could not be acquired under the mining laws except as to valid claims existing at the date of the act "and thereafter maintained in compliance with the laws under which initiated"?

D. *The Krushnic Court Review*

As a result of the Department's interpretation of its duties and responsibilities in administering the public lands and in accordance with its construction of the Mineral Leasing Act thousands of oil shale claims were declared null and void on the grounds of a failure to maintain the claims by the performance of annual assessment work. In one such case (Krushnic) the parties were sufficiently interested to seek court review.

In that case the Department had concluded that the claim, which was the subject of a patent application, had become null and void by the failure to perform the annual assessment work for one year, and that the subsequent resumption of the assessment work by Krushnic did not affect the validity of the claim.

In its decision *United States ex rel. Krushnic* v. *West*, 30 F.2d 742 (U.S. App. D.C. 1929), the Court of Appeals for the District of Columbia refused to follow the rationale of what is now the Tenth Circuit Court in the Hodgson decision. At page 746 the court held:

> The fundamental error in the opinion, as we have pointed out, was in holding that failure to do assessment work automatically terminates a locator's rights. It was this misinterpretation of the law which led the Department into error.

The court thereupon reversed the action of the Department in declaring the Krushnic claim null and void, and ordered the issuance of a writ of mandamus to compel the Secretary to issue a patent to the oil shale claim involved in that case.[11]

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[11] The court concluded it could compel the Secretary, by a writ of mandamus, to issue a patent only because the De-

The Supreme Court also held in favor of the mining claimant. At pages 317 and 318 the court in *Wilbur* v. *United States ex rel. Krushnic*, 280 U.S. 306 (1930) held:

> It is not doubted that a claim initiated under section 2324, Rev. Stat., could be maintained by the performance of annual assessment work of the value of $100.00; and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning of the leasing act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened,

The Supreme Court modified the Circuit Court's mandamus order, however, stating, in effect, that the Secretary should not be ordered to issue a patent, but should be ordered to dispose of the patent application on its merits, without reference to the default in the performance of assessment work which had been cured.

It seems clear that the court in the *Krushnic* decision simply found that the Secretary had erroneously interpreted and applied the law in discharging his duty of determining the validity of the mining claim and Krushnic's right to a patent. The court did not in any way cast any doubt upon the jurisdiction of the Department of the Interior to investigate and

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partment had conceded all facts in favor of the issuance of a patent except the fact of performance of assessment work. This being the case, the court, at page 746, held it was "not invading the exclusive jurisdiction of the Secretary to determine discretionary questions of fact, nor his interpretation of the meaning of a law upon which the exercise of his discretion depends."

determine the validity of the mining claim and the right of Krushnic to a patent for the land. Nor did the court cast any doubt upon the authority of the Interior Department to construe and apply the Mineral Leasing Act in the discharge of its duty to determine the claimed right of Krushnic to an interest in the public domain.

Following the Supreme Court's decision the Department of the Interior issued two decisions implementing the Court's directives. In the first, *Standard Shales Products Company* (On Rehearing), 53 I.D. 42, 45 (1930), the Department held:

> . . . Therefore the order directing adverse proceedings against the claims on account of such default (in assessment work) was unauthorized and is hereby vacated and the case is remanded with directions to clearlist the claims for patent, all else being found regular. The case of *Emil L. Krushnic* and all others in so far as they are in conflict with this decision are overruled.

This case was pending before the Department as the result of a motion for rehearing filed by the mining claimant. The Department acceded to the request of the claimant to withhold consideration of the motion until final decision of the *Krushnic* case in the courts.

The second decision, *Emil L. Krushnic* (On Reconsideration), 53 I.D. 45, 46 (1930), concludes with the following:

> Although no writ has yet been served upon the Secretary, no reason for delay is perceived for disposing of the application in accordance with the law as stated by the Supreme Court. The departmental decisions above mentioned [*Emil L. Krushnic*, 52 L.D. 282, *Emil L. Krushnic* (On

Rehearing), 52 L.D. 295], are accordingly hereby recalled and vacated. The record in the case is herewith transmitted with instructions to reinstate the application and entry and to dispose of the same unaffected by the default in the performance of assessment labor for the assessment year 1920, and if all else is found regular, to clearlist the application for patent.[12]

III. The 1930-1945 Period

A. *The post-Krushnic Assessment Work Contests*

In view of the language in the *Krushnic* case that an "owner equally maintains his claim, within the meaning of the leasing act, by a resumption of the work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened," the Department took the necessary action to investigate and determine the validity of oil shale claims upon which assessment work had not been resumed.

The Department's challenge to the validity of a claim for which assessment work was not being done took the form of a notice posted on the claim; the notice declaring that the United States had taken possession of the land for its exclusive use and benefit. This was a tremendous undertaking. Its magnitude is illustrated by the following excerpts from the Secretary's annual reports for the years 1930 through 1933 (Exhibit M):

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[12] If the word "overruled," as used by the Department, is the equivalent of "vacated," this final departmental *Krushnic* decision is surplusage as the Department in the *Standard Shale Products Company* decision, *supra*, which immediately preceeded this decision, specifically "overruled" the earlier *Krushic* decisions and all other in conflict with that decision.

1930

Oil-shale lands, though having no immediate value for oil, have received vigorous protection. During the past year, commencing last spring, every mining engineer in the General Land Office, save three, was called off other work and under my personal orders assisted in identifying, examining, and physically posting more than 6,400 oil-shale claims with notice of default to the United States for failure of the claimant to perform assessment work. This followed the Supreme Court decision of *Wilbur* v. *Krushnic.*

. . .

1931

Charges were directed against 7,568 locations, embracing approximately 900,592 acres.

Sixty-four oil-shale contests were on hand at the beginning of the year; 217 were received, 178 of these contests were decided, leaving 103 unadjudicated July 1, 1931. During the year, 1,181 shale locations, embracing approximately 140,539 acres, were declared null and void.

1932

Charges were preferred against 14,395 locations embracing approximately 1,713,000 acres. Undecided at the beginning of the year were 103 oil-shale contests, to which number was added 1,794 new cases. Decisions were rendered in 1,777, leaving 120 pending. Locations numbering 10,918 for 1,294,500 acres were declared null and void.

1933

Charges were directed against 873 locations embracing 113,490 acres.

There were 120 contests against oil-shale locations pending at the beginning of the year, including locations under patent proceedings; 1,655 new cases were added and 1,615 were disposed of, leaving 160 pending. Locations to the number of 11,146 for 1,448,980 acres were declared null and void.

The report for 1934 states that action on oil shale locations was suspended on April 1, 1933, insofar as challenges based on a failure to perform annual assessment were concerned, to await the outcome of litigation brought to test the validity of the action taken by the Department, litigation which ended with the issuance by the Supreme Court of the decision in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639 (1935).

Other actions affecting the oil shale lands had, however, transpired before the *Ickes* decision was issued. These will be discussed briefly at this point.

B. *The General Withdrawal of Oil Shale Lands*

Although the Mineral Leasing Act of February 25, 1920 modified the pre-existing mining laws of the United States to the extent that oil shale and the other named minerals and lands containing such deposits were no longer subject to appropriation and location under the mining laws, the lands containing such minerals remained, by virtue of the Act of July 17, 1914, *supra*, and the Stock-Raising Homestead Act of December 29, 1916, *supra*, open to agricultural and other non-mineral entries. In addition, of course, the lands and deposits of minerals were sub-

ject to lease under the Mineral Leasing Act.[13] This was changed by an Executive Order dated April 15, 1930 (Exhibit Q), which reads in part as follows:

> Under authority and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), it is hereby ordered that subject to valid existing rights the deposits of oil shale, and the lands containing such deposits owned by the United States, be, and the same are hereby, temporarily withdrawn from lease or other disposal and reserved for the purposes of investigation, examination, and classification.

This order coupled with the withdrawal accomplished by the 1920 Mineral Leasing Act with respect to mining locations withdrew the oil shale lands from appropriation under any of the public land laws.[14]

On April 3, 1931, an Act of February 28, 1931, 46 Stat. 1454, amending the Stock-Raising Homestead Act of 1916, was construed to permit stock-raising homestead applications to be made for lands contain-

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[13] No attempt has been made to check the number of non-mineral entries or the number of leases and/or permits issued for the various minerals named in the Mineral Leasing Act that may have conflicted with oil shale claims covering millions of acres in Colorado, Utah and Wyoming.

[14] It might be argued that the 1930 withdrawal was under the Pickett Act, and accordingly, the lands remained open to the location of mining claims covering metalliferous minerals. This, however, overlooks the fact that Section 1 of the Mineral Leasing Act, 30 U.S.C. 181, provided that deposits of oil shale, and lands containing such deposits could only be disposed of in the form and manner provided by the Mineral Leasing Act.

ing deposits of oil shale withdrawn by the Executive Order of April 15, 1930 (Exhibit Q).

On February 6, 1933, an Executive Order was issued modifying the 1930 withdrawal to the extent of authorizing the Secretary of the Interior to issue oil and gas permits and leases under the general leasing act of 1920 for any of the withdrawn lands (Exhibit Q).

The Executive Order of April 15, 1930, was further modified by an order dated May 13, 1935, authorizing the Secretary of the Interior to issue sodium permits and leases under the leasing act for any of the withdrawn lands (Exhibit Q).

In summary, the oil shale lands were closed to mining locations by the Act of February 25, 1920, and then closed to all other appropriations by the Executive Order of April 15, 1930. The lands were subsequently opened during the 1930s to acquisition under the Stock-Raising Homestead Act and to oil and gas and sodium leasing under the 1920 act.[15]

It might be argued that when the oil shale claims were declared null and void between 1930 and 1933 and the decisions became final, the claims did not go into a suspended status awaiting the possibility of subsequent action at some indefinite time in the future, but the lands reverted to the unappropriated public domain, and the Congressional withdrawal under the Mineral Leasing Act and the Presidential withdrawal under the Order of April 15, 1930, attached to the lands. Under this argument it is cer-

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[15] Again no attempt has been made to ascertain the number of stock-raising homesteads or the number of oil and gas or sodium leases and/or permits that may have come into existence covering the hundreds of thousands of acres of oil shale claims that had been declared null and void between 1930 and 1933.

tainly questionable, if the assessment work decisions were effective when rendered, that a Secretary of the Interior could breathe life into thousands of oil shale claims and thereby remove hundreds of thousands of acres of land from the Congressional and Presidential withdrawals.

C. *The Indian Lands*

Almost all, certainly the most important, oil shale lands in the State of Colorado, and a great portion of the oil shale lands in the State of Utah, had been set apart in the 1860s as Indian reservations (Exhibits P and UU).

The area set apart in the State of Colorado, including the all-important Piceance Creek basin area, was set apart for the exclusive use of the Ute Indians by the treaty of March 2, 1868 (13 Stat. 619). Under the terms of this treaty, no non-Indian had the right to make either a mining or an agricultural entry on the lands. By the Act of July 23, 1882 (22 Stat. 178), the major portion of the lands set apart for the reservation, including the Piceance Creek basin area, was, however, made a part of the public domain, thus becoming subject to both mineral and agricultural entry under the public land and mineral laws.

In Utah, the Act of May 5, 1864 (13 Stat. 63), established a reservation in the Uintah Valley for the Indians living in the Territory of Utah. The Act of May 27, 1902 (32 Stat. 245), restored much of this land to the public domain. A portion of the act reads as follows:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as

> practicable by an inspecter, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain.

The Indian lands discussed above remained as public domain lands, subject, however, to certain rights of the Indians to share in the proceeds received from the disposition of the lands until 1934. In that year, Congress passed the Act of June 18, 1934 (48 Stat. 984), to conserve and develop Indian lands and resources and for other purposes. Section 3 of that act is quoted below:

> The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States: Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act.

Pursuant to the language in the above-quoted section, the Secretary of the Interior, on September 19, 1934 withdrew Indian reservation lands, including the affected oil shale lands in Utah and Colorado, from further disposition. The reason for the withdrawal is stated in the Instructions of August 10,

1934, reprinted in 54 I.D. 559 (Exhibit P), a portion of which follows:

> It, therefore, will be some time before it is known definitely whether the Indians of any of the reservations will exclude themselves from operation under the act . . . there is a possibility that in the meantime some desirable undisposed of "opened" lands might be entered or filed upon by non-Indians and thereby prevent the restoration of such lands to tribal ownership. For this reason, action should be promptly taken to prevent, for the present, the further disposition of any such lands by public entry, sale, or otherwise. A withdrawal of this kind would be merely of a temporary nature.
>
> * * * *
>
> It is, therefore, recommended that all undisposed-of lands of the Indian reservations named above that have been "opened," or authorized to be "opened," to sale, entry, or any other form of disposal under the public land laws, or which are subject to mineral entry and disposal under the mining laws of the United States . . . be temporarily withdrawn from disposal of any kind, subject to any and all existing valid rights, until the matter of their permanent restoration to tribal ownership, as authorized by section 3 of the Act of June 18, 1934, supra, can be given appropriate consideration.

By orders of restoration dated July 17 and November 13, 1937 (Exhibit P) the Secretary purported to restore certain lands in the southern portion of the area in Colorado ceded in the agreement of 1880 to the Ute Indians. The restoration to tribal ownership of the Ute Reservation lands in the State of

Colorado was halted by an additional act of Congress.[16] Section 6 of that act, the Act of June 28, 1938 (52 Stat. 1209), reads in part as follows:

> . . . Anything in any other Acts of Congress to the contrary notwithstanding, no lands in Colorado north of and including range [township] 35 formerly owned or claimed by the Ute Indians or any band thereof shall be restored to tribal ownership under the provisions of section 3 of the Act of June 18, 1934 (48 Stat. 984), and said lands to the extent they have not been disposed of by the United States are hereby declared to be the absolute property of the United States.

Hence, by an order dated December 8, 1938, the Secretary of the Interior revoked the temporary withdrawal of September 19, 1934 as to the lands in Colorado. The revocation became effective January 31,

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[16] In *The Confederated Bands of Ute Indians* v. *United States* (1943) 100 Ct. Cl. 413, 419, the following statement appears:

> Many of the lands ceded under the Act of 1880 and undisposed of on June 18, 1934, had been included in grazing districts under the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, and furnished a necessary basis for the stock-raising industry in the western part of Colorado. Since the Taylor Grazing Act specifically provided that no Indian reservation could be included in a grazing district, the purported restoration by the Secretary of the Interior of public land in Colorado to the Ute Indians created much alarm and uneasiness among the citizens of western Colorado who feared that all the lands not yet disposed of under the 1880 Act might be similarly treated by the Secretary of the Interior. To prevent any further action of this nature, an amendment to the pending bill which became the Jurisdictional Act of June 28, 1938, was offered and adopted. . . .

1939, at which time all the lands and mineral deposits released by the order became subject to use and disposition as provided by the public land laws and the mining laws of the United States.

Congress did not interfere with the restoration of tribal lands in Utah. On August 25, 1945, the Department issued an order restoring approximately 217,000 acres of unallotted Indian lands to tribal ownership, in that State, much of which is oil shale land (Exhibit UU). While no definite determination appears to have been made concerning the rights of the Indians in Utah to oil shale, there is at least some indication that the Indians may have obtained both the surface of, and the minerals found in, the lands restored in 1945.[17] If the assessment work decisions rendered between 1930 and 1933 were effective when rendered, then the inchoate rights of the Indians in Colorado and Utah attached to the lands. While the rights of the Indians in Colorado were subsequently eliminated in 1938, the inchoate rights of the Indians in Utah remain effective today.

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[17] In an opinion published in 59 I.D. 393, dated January 27, 1947, the Solicitor concluded, according to the headnote:

> The order of August 25, 1945, restoring to tribal ownership "all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation" includes minerals reserved to the United States under patents issued for the surface of the opened lands of the reservation.

A patent dated October 5, 1959 (Exhibit UU), conveying the fee simple title in 121,899.70 acres of land to the Antelope Sheep Range Company, reserves to the Ute Indian Tribe of the Uintah and Ouray Reservation, and the affiliated Ute citizens, all minerals and mineral rights in the lands.

D. *The Taylor Grazing Act*

The Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C. 315 *et seq.*, the Taylor Grazing Act, provided, among other things, for the prevention of injury to the public lands by overgrazing and soil deterioration, for the orderly use, improvement and development of such lands, and for the stabilization of the livestock industry dependent upon the public range.

Executive Order 6910 (Exhibit R) was issued to effectuate the purposes of the act. This Order, dated November 26, 1934, withdrew, under the provisions of the Picket Act, as amended, all the vacant, unreserved and unappropriated lands of the public domain in certain states, including Colorado, Utah and Wyoming, and reserved the land "for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said Act of June 28, 1934, and for conservation and development of natural resources." The withdrawal was subject to existing valid rights.

Executive Order 6910 was amended by Executive Order 7048, dated May 20, 1935, to permit the exchange of private for public lands, and to make the earlier Order applicable to "all lands within the states mentioned therein upon the cancellation or release of prior entries, selection, or claim, or upon the revocation of prior withdrawals unless expressly otherwise provided in the order of revocation" (Exhibit R). Thus, it might be argued that the withdrawal was specifically extended by the President to all of the lands previously embraced by oil shale claims that had been cancelled for any reason, including a failure to perform annual assessment work.

By Executive Order 7274 of January 14, 1936, the withdrawal was lifted as to "all lands which are now, or may hereafter be, included within grazing

districts duly established pursuant to the provisions" of the Taylor Grazing Act (Exhibit R).

No attempt has been made to determine the number of livestock operations that have been dependent over the past 30 years upon the hundred of thousands of acres of public range covered by the thousands of oil shale claims in Colorado, Utah and Wyoming that were declared null and void between 1930 and 1933.

E. *The Ickes Decision*

As noted previously, the Department of the Interior in investigating and determining the validity of the oil shale claims plastered over the public domain in Colorado, Utah and Wyoming posted notices of forfeiture on thousands of claims and instituted contests to determine the validity of thousands of claims. Between 1930 and 1933 oil shale claims covering hundreds of thousands of acres were declared null and void. All the available evidence indicates that the action of the Department went largely unheeded.[18] Most of the mining claimants who were served with contest complaints ignored them even though the complaints warned that a failure to respond would be taken as an admission of the truth of the charges asserted in the complaint and the mining claims would be declared null and void.

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[18] The number of contests decided by default in favor of the Government can be inferred from the number of contests concluded in a single year. For the fiscal year ending June 30, 1931, the Secretary of the Interior stated that "during the year 1,181 shale locations, embracing approximately 140,539 acres were declared null and void;" for fiscal year 1932 the Secretary stated that "locations number 10,918 for 1,294,500 acres were declared null and void;" and for fiscal year 1933 the statement was that "locations to the number of 11,146 for 1,448,980 acres were declared null and void" (Exhibit M).

While most of the contests were decided on the basis of the contestees' defaults, a few mining claimants had enough interest left in their oil shale claims to respond to the Government's proceedings. One such mining claimant was the Virginia-Colorado Development Corporation. The Virginia-Colorado claims were declared null and void, as were the thousands of others, on the basis of the Department of the Interior's construction of (1) Section 37 of the Mineral Leasing Act as requiring the performance of annual assessment work in order to maintain the validity of an oil shale claim, and (2) the *Krushnic* decision as holding that in the absence of a resumption of annual assessment work an oil shale claim was not maintained as required by the Mineral Leasing Act and was not a valid existing claim.

Eventually the case involving the Virginia-Colorado claims reached the Supreme Court, and in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, the court reversed the decision of the Department of the Interior. The court found under the admitted facts and its construction of the law that the Virginia-Colorado claims came within the exception in the Mineral Leasing Act as to valid claims existing on the date of the passage of the act, "and thereafter maintained in compliance with the laws under which initiated."

The court stated in this connection as follows:

> How could the valid claims of plaintiff be "thereafter maintained in compliance with the laws under which initiated"? Manifestly, by a resumption of work. Plaintiff was entitled to resume, and the bill alleged that plaintiff had made arrangements for resumption, and that work would have been resumed if the Department of the Interior had not intervened. Plaintiff's rights

> after resumption would have been as if "no default had occurred." Belk v. Meagher, 104 U.S. 279, 26 L. ed. 735, supra. Such a resumption would have been an act "not in derogation but in affirmance of the original location," and thereby the claim would have been "maintained." As we said in Wilbur v. United States, supra (280 U.S. p. 318, 74 L. ed. 449, 50 S. Ct. 103). "Such resumption does not *restore* a *lost* estate . . .; it preserves an existing estate."

In this view, plaintiff came directly within the exception.

The court then concluded its decision with the following language:

> We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law.

If the *Ickes* decision is construed as holding that the Department of the Interior acted beyond its jurisdiction is erroneously construing the Mineral Leasing Act and the *Krushnic* decision in discharging its duties and responsibilities of determining the validity of the rights claimed by Virginia-Colorado in the public lands, then the Department of the Interior cannot possibly administer the 460 million acres of public lands under its jurisdiction. If when a construction of law is determined to be erroneous by a court, the erroneous construction is equated to the basic jurisdiction of the Interior Department, then no one could ever rely on any action taken by the Department in administering the public lands.

If the *Ickes* decision is construed as holding that the Department of the Interior had the necessary jurisdiction to determine the validity of the claims,

but the Department's interpretation of Section 37 of the Mineral Leasing Act was erroneous and therefore there was no authority to support the action of Interior in declaring the claims null and void, then Section 37 of the Mineral Leasing Act becomes meaningless. Such a construction would ignore the purpose of the act and the announced intent of Congress that the leasing act minerals could not be disposed of under the mining laws except as to valid claims existing on the date of the act and thereafter maintained in compliance with the laws under which initiated.

The *Ickes* decision can properly be construed as holding that the decision of the Interior Department was erroneous inasmuch as Virginia-Colorado was entitled to resume its annual assessment work, it had made arrangements for the resumption, and therefore it came directly within the exception in the Mineral Leasing Act as to valid existing claims maintained in compliance with the laws under which initiated.

F. *Action Subsequent to the Ickes Decision*

As a result of the *Ickes* decision the Department of the Interior issued *The Shale Oil Company* decision dated June 24, 1935, 55 I.D. 287 (Exhibit W). This decision was issued in a case that was pending on appeal before the Office of the Secretary. The Department by this decision (1) reversed the decision of the Commissioner of the General Land Office in the case pending on appeal in view of the *Ickes* decision, (2) recalled and vacated the previous decision of the Department involving the Virginia-Colorado claims as was required in view of the court's decision in the *Ickes* case, and (3) overruled as precedent the previous decisions of the Department holding that oil

shale claims could be declared null and void because of a faliure to perform annual assessment work.

The Secretary's Office and the Office of the Commissioner also issued similar decisions on other contest cases that were pending and that had not previously been disposed of by decisions that had become final. With the exception of one instance, no action was taken by the Department of the Interior to vacate, change or modify any of the thousands of decisions that had become final with the cases being closed in the years prior to the *Ickes* decision.

The one instance was an unpublished decision dated September 3, 1935 (Exhibit Z) entitled "Motion for Rehearing" in which the Office of the Secretary at the request of a mining claimant specifically vacated a previous decision that had become final in [illegible].

In view of the fact that thousands of oil shale mining claimants had been notified that the Department of the Interior regarded their claims as nullities, and that the United States had taken possession of the land embraced within their claims for its own use and purposes, one might expect that the Department of the Interior would have been deluged with inquiries from the mining claimants (who were spread from New York to California) concerning the effect of the *Ickes* decision on the previous decisions declaring their claims null and void. Surprisingly, however, only five mining claimants corresponded with the Department between 1935 and 1944. The lack of inquiry may have been due to any of several reasons. It seems clear, however, that a major factor was a complete lack of interest in the oil shale claims that had been located some 15 years previously for speculative purposes. Another factor may have been a recognition that the Interior Department had historically refused to revitalize entries fi-

nally cancelled even though the Supreme Court subsequently ruled in another case that there was no authority to support the action taken by the Department.[19]

One of the five inquiries was answered by the Office of the Secretary in the form of the decision entitled "Motion for Rehearing" (Exhibit Z). The other inquiries were answered by letters from the Office of the Commissioner. While it does appear that the writer or writers of the answers to the inquiries in the Commissioner's Office were of the opinion that the previous decisions were null and void and, therefore, it would be unnecessary to revoke or vacate the previous decisions, the fact still remains that the Secretary of the Interior apparently shared a different opinion as evidenced by the decision entitled "Motion for Rehearing." In any event, it is important to note that the letters from the Commissioner's Office were not given any distribution and apparently were not even known of until the present proceedings were commenced.

G. *Interest in Oil Shale*

It seems proper to conclude from the appendix entitled "The Title History," the appendix entitled

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[19] See, for example *Lilly M. Kelly*, 49 L.D. 659 (1923) and *Honey Lake Valley Company et al.*, 48 L. D. 192 (1921); in *Thomas Hall*, 44 L.D. 113 (1915), the Department, at page 114, held:

> It is a well-settled doctrine that a final adjudication will not be later disturbed because of a subsequent change in the construction of the law which governed the case at the time it was originally adjudicated. This rule has been generally enforced by this Department, even in cases where the Department's construction of statutes has been declared erroneous by the Supreme Court. (Frank Larson, 23 L.D. 452; Mee v. Hughart et al., 23 L.D. 45[illegible]

"History of the Specific Lands Embraced by the Oil Shale Claims in Question," and the fact that a tremendous number of the thousands of mining claimants were not sufficiently interested in their claims to respond to the Department of the Interior contest proceedings during the 1920s and early 1930s, that the interest in oil shale lands created by the speculative fever existing prior to the Mineral Leasing Act of 1920 died almost as fast as it started. Nevertheless, some parties through the years were sufficiently interested in the lands to attempt to obtain a patent from the United States for $2.50 per acre. The parties were certainly not interested in the lands from the standpoint that they were presently valuable for mining purposes. The interest was either one of speculation, or the use of the lands for purposes other than mining.

For the 10-year period following the *Ickes* decision in 1935 through 1945 four patent applications were filed with patents subsequently being issued covering 15 oil shale claims (Exhibit 95). None of these claims had previously been declared null and void on an assessment work charge.

IV. The 1945-1960 Period

A. *The Synthetic Liquid Fuels Act*

It appears that activity in the oil shale area has always been based on pessimistic predictions as to the extent of the Nation's reserves of liquid petroleum. One of the Major reasons for the speculative boom in the location of mining claims during the four years immediately preceding the passage of the Mineral Leasing Act of February 25, 1920 was, no doubt, the ill-founded predictions of some persons, made in a time of world crisis, to the effect that the United

States was fast running out of its reserves of liquid petroleum. When later events, such as the discovery of the East Texas oil fields, proved the gross error of the predictions, interest in oil shale waned to the point of disappearing completely.

The lack of interest in oil shale was almost total until World War II again taxed the Nation's capacity to produce fuels from its sources of liquid petroleum. This led to a second round of pessimistic predictions about the reserves of liquid petroleum in the United States, predictions that caused the Government to investigate alternative sources of liquid fuels.

It should be remembered that the Director of the Geological Survey in his letters of May 23, 1916, to the Commissioner of the General Land Office (Exhibit N), recommended against the withdrawal from mineral entry of the oil shale lands in the hope that private industry would take the lead in developing the oil shale deposits. His hopes were never realized. While some individuals were willing to plaster the public domain in Colorado, Utah and Wyoming with oil shale claims, few, if any, of them made any serious effort to develop an industry based on the production of synthetic liquid fuels from oil shale. Thus, the Government, when it decided to investigate alternative sources of liquid fuels, found that it had to do what the Director of the Geological Survey hoped in 1916 private industry would do, that it, it had to perform the initial experimental work necessary to determine whether oil shale was a feasible alternative source of petroleum products.

In view of the failure of private industry to develop an oil shale industry during the 45-year period that had elapsed since the Geological Survey had first directed attention to the undeveloped oil shale deposits in Colorado, Utah and Wyoming (Exhibit

N), Congress had to include oil shale among other possible alternative sources of liquid fuel for which the Government would have to perform basic experimental work. Thus, on April 5, 1944, Congress passed the Synthetic Liquid Fuels Act, 58 Stat. 190, "Authorizing the construction and operation of demonstration plants to produce synthetic liquid fuels from coal, oil shales, agricultural and forestry products, and other substances, in order to aid the prosecution of the war, to conserve and increase the oil resources of the Nation, and for other purposes." [20]

Under the authority of this Act, the Bureau of Mines, an arm of the Department of the Interior, constructed experimental oil shale retorts and a refinery near Rifle, Colorado, and began basic experimentation in the mining and retorting of oil shale and the refining of shale oil.[21] This experimentation,

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[20] By the terms of the April 5, 1944 Synthetic Liquid Fuels Act, funds not to exceed $30,000,000.00 were authorized to be appropriated to synthetic fuel research and development over a five-year period. A 1948 amendment to the Synthetic Liquid Fuels Act extended the duration of the original act three additional years, and increased the maximum appropriation from $30,000,000.00 to $60,000,000.00 (62 Stat. 79). In 1950 the original act, as amended, was again amended, extending the life of the act from 8 to 11 years, and increasing the maximum appropriation from $60,000,000.00 to $87,600,000.00 (64 Stat. 905). A project allocation sheet prepared by the Bureau of Mines in connection with this 1950 amendment indicates that according to the Bureau's estimates concerning expenditure of the newly appropriated funds over the additional three-year period, $6,685,000.00, or roughly one-fourth of the appropriation increase, would be used on projects dealing with oil shale (Legislative History of Sept. 22, 1950 Amendment of Synthetic Liquid Fuels Act; *U.S. Code Congres. & Admin. News* 1950, p. 3892).

[21] Certain of the Bureau of Mines' facilities were constructed on the Oyler No. 4 claim (Exhibit LL). It is inconceivable that

which began in the late 1940s, ended in 1956 when Congress refused to appropriate additional funds to continue the project.

The status and accomplishments of the project at the time of its closing is indicated by the following testimony before the Senate Committee on Appropriations, Supplemental Appropriations Bill, 1956, Hearings on H.R. 7278, 84th Cong., 1st Session, page 846:

> Senator POTTER. You have a technique, do you not? Now it is a matter of cost, bringing the cost item down?
>
> Mr. CATTELL. We have been working on three different subjects; first, to develop a low cost, safe method of mining. Unless the shale can be mined at a very low cost, shale-oil production cannot be economical.
>
> The second step, after the mining, is to convert the shale to a crude shale oil. That takes what we call retorting. We have been experimenting in that direction also.
>
> The third step is to reduce that crude shale oil to marketable products. We did engineering-scale research on refining at Rifle. We are continuing to do research on a laboratory scale at Laramie on the principles of refining and the chemistry of the oils. But we went as far as we needed to go at Rifle and stopped that part of the experimentation. We felt that with the information the Bureau had developed, and with what the companies were equipped to do, that phase was finished.

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these facilities would have been constructed on the claim if the claim was valuable for and was being used for mining purposes.

We do not feel that we have finished the retorting phase. We had developed what we thought was a good mining method which gave low cost. Then the roof fell and showed us that we had not understood some of the things about that shale and that a different—a revised—method of mining must be developed. And that will take experimental mining operations to test the things we developed.

The following statements before the Senate Committee on Appropriations, Supplemental Appropriations Bill, 1956, Hearings on H.R. 7278, 84th Cong., 1st Session, page 504, shed some light on the closing of the Bureau of Mines experimental facilities:

Senator DIRKSEN. I see a comment in the House report that the Secretary of Interior had a survey team which reported that the plant should be put in standby condition, is that correct?

Senator MILLIKIN. I am very glad you asked that question. I think the whole thing was a misconceived probably well-intentioned effort to help the situation but everybody on that council was in the liquid oil business. There was not a single person there making any oil shale, not one. I think that I can generalize by saying that.

How many were on the council?

Mr. GUTHRIE. In the National Petroleum Council?

Senator MILLIKIN. Yes.

Mr. GUTHRIE. I think they had about 25 in their committee.

Senator MILLIKIN. I have been in this oil shale business since 1919. I know of my personal

> knowledge who had done work in the field and who has not.
>
> There is not one on that council, unless it would be the Union Oil Co., that has made any contribution toward the oil shale business, which is different from the petroleum business.
>
> I want to be very conservative, but it was a very nervy performance for people who were in the liquid petroleum business to come along and suggest that this potential competitor of that industry be put out of business and that the plant be mothballed. I think it was misconceived.
>
> I do not think they had any right to pose as authorities on the subject because they have contributed nothing to it.

In the spring of 1964 the Government's experimental oil shale mine and other facilities at Anvil Points near Rifle, Colorado was reactivated for research by private industry. An agreement was entered into under which the Colorado School of Mines Research Foundation, Inc. acquired a five-year lease to the Anvil Points installation. The Foundation, in turn, subsequently contracted with Socony Mobil Oil Company to perform research an Anvil Points for Socony, Humble Oil and Refining Company and other participating major oil companies.

The purpose of the research at Anvil Points is indicated by the following press release issued by Socony-Mobil Oil Company on September 14, 1964:

> Mr. Cramer said shale oil could be produced on a commercial scale only if and when it could be extracted at costs competitive with those of crude oil and other forms of energy. So far, he went on, no way has been found to achieve this, despite long research by Socony Mobil, other

companies, and the U. S. Government. The research program he heads is seeking such a breakthrough.

B. *The Multiple Mineral Development Act of 1954*

The Multiple Mineral Development Act of August 13, 1954, 68 Stat. 708, *et seq.*, 30 U.S.C. 521, *et seq.*, was enacted to resolve the conflicts between the mining laws of the United States and the Mineral Leasing Act of 1920 which had prevented the mineral development of the same tracts of the public lands from going forward under both systems. The conflicts to be resolved were explained as follows in Senate Report No. 1610, 1954 U.S. Code Cong. & Am. News, at page 3027:

> Land on which mineral locations have been made under the mining laws has not been open to leasing under the Mineral Leasing Act, and on the other hand land covered by an oil and gas lease or a permit, or an application or offer for the same, under the Mineral Leasing Act, or known to be valuable for oil and gas or other Leasing Act minerals, could not be located under the mining laws.
>
> S. 3344 would permit the development of mineral resources of the public lands, including uranium, to go forward on the same tracts of land under both systems. It would thus be a step forward in the development of the natural resources of the Nation. . . .

The act provides, among other things, (1) that mining claims can be located for metalliferous minerals on lands known to be valuable for any of the minerals covered by the 1920 leasing act, subject, however, to a reservation to the United States of all

minerals disposable under the leasing act, and (2) for a procedure whereby a lessee or applicant under the leasing act can obtain a determination as to the existence of unpatented mining claims and the validity of such claims that might conflict with the interests held or sought under the Mineral Leasing Act.

The problem of conflicts between old oil shale mining claims and oil and gas leasing under the 1920 act was discussed as follows in testimony by Clair Senior, an attorney appearing in behalf of the American Mining Congress in hearings held before the Subcommittee on Mines and Minerals of the Committee on Interior and Insular Affairs, House of Representatives, 83d Congress, 2d Session, on H.R. 8892 and 8896:

> . . . But actually one of the thinks [*sic*] that is causing the greatest difficulty in that area is this matter of these old, old claims located prior to 1920 which are still on the record without any knowledge as to whether any one claims anythink [*sic*] under them or not.
>
> It so happens that frequently you may find that the original locators would not claim something, but the alert speculator who had found their heirs, after somebody had found an oil well, would be there claiming. (page 30)
>
> * * * *
>
> May I say that one of the greatest difficulties exists in regard to claims that were located out in the area there many years ago, before the passage of the Mineral Leasing Act—let us say for the oil shale claims—hundreds of thousands of acres.
>
> On the plateaus where there are oil shale exposures, and those claims were located, placer claims could be located by 8 people right in 160

acres, with no limitation on the number of claims those same 8 people could locate.

Nothing has been done, nothing is on the record, since that claim was located in 1917.

In 1920 the Leasing Act was passed that closed the door to the location of claims for oil shale, as it closed the door for the location of claims for oil shale, it also closed the door for the forfeiture of location, because of default in performance of annual assessment of labor, and gave an immunity in respect to annual assessment labor or performance. (page 49)

C. *The Interest in Oil Shale*

For the period from 1947 through 1960 (when the last oil shale patent was issued) the Bureau of Land Management clear listed 101 patent applications and granted patents covering 753 oil shale claims in the state of Colorado (Exhibit 95). The number of oil shale claims patented covering lands in the states of Utah and Wyoming is not known. The oil shale claims were patented under the mining laws and as such were presumably valuable for mining purposes.[22]

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[22] Compare the history of oil shale with the following:

In *Chrisman* v. *Miller* (1905), 197 U.S. 313, the court in considering what is necessary to constitute a discovery of valuable mineral within the purview of the mining laws quoted in part as follows from the case of *Iron Silver Mining Company* v. *Mike and S. Gold and Silver Mining Company*, 143 U.S. 394:

> "The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral." (197 U.S. 321)

The court in the *Chrisman* case continued by stating:

> "... There must be such a discovery of mineral as gives reasonable evidence of the fact, either that there is a vein

It seems proper to assume that with the advent of the Bureau of Mines' experimental operations at Anvil Points, and experimental operations conducted by the Union Oil Company near Grand Valley, Colorado, in the early 1950s, interest again increased in the oil shale claims that had lain stagnant over the public domain in the states of Colorado, Utah, and Wyoming. As noted previously, for the 10-year period following the *Ickes* decision only 15 oil shale claims were patented in the state of Colorado.

If the 104 mining claims involved in the four consolidated cases presently under consideration and the additional 35 mining claims shown in the abstract of title covering the Bute, the Atlas and the Camp Bird claims (Exhibit 295) are typical of the history of oil shale claims and the activity (or inactivity) that has taken place with respect to the thousands of oil shale claims covering hundreds of thousands of acres

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or lode carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining." (197 U.S. 323).

In *Mulkern* v. *Hammitt* (1964), 326 F.2d 896, the United States Court of Appeals, Ninth Circuit stated:

"This court, in the recent case of Adams v. United States, 9 Cir., 318 F.2d 861, dealt with this very question, and held that even though the mining claim there in litigation would, at one time, have satisfied the test, nevertheless the Government rightfully denied a patent to the claimant since, because of changed economic conditions, the claim did not presently satisfy the test." (page 898)

In *Foster* v. *Seaton* (1959), 271 F.2d 836, the United States Court of Appeals, District of Columbia Circuit commented:

". . . To allow such land to be removed from the public domain because unforseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development." (page 838)

of lands, the overwhelming majority of all such claims were abandoned sometime prior to 1930.[28]

A study of the appendix entitled "The Title History," the appendix entitled "The Assessment Work Contest Proceedings," and the appendix entitled "History of the Specific Lands Embraced by the Oil Shale Claims in Question" can lead to no other conclusion than that the mining claimants lost all interest in the Bute, the Atlas, the Camp Bird and the Carbon and Elizabeth claims prior to the initiation of the contest proceedings in the 1930s and that the record title holders of the remaining claims in suit lost interest after the claims had been declared null and void in the 1930s.

One aspect of the increased interest in oil shale lands between 1947 and 1960 was the practice followed by sharp speculators who sought out one or two original locators or the heirs of one or two original locators and obtained quitclaim deeds at a cost of pennies per acre and then purportedly forfeited out all other record title holders by the alleged performance of assessment work for one year. As indicated in the appendix entitled "The Title History" 100 of the 104 claims involved in the present litigation were the subject of such a practice.

No attempt has been made to ascertain how many of the thousands of oil shale claims, covering hundreds of thousands of acres, that had lain dormant from the time of location during the speculative fever

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[28] Of course, abandonment would be virtually impossible to prove inasmuch as it is not human nature to admit abandoning something that might have some value at sometime in the future. And how could one show that the claims had been abandoned by the thousands of heirs of original locators who in all probability did not even know that they had inherited an interest in oil shale claims.

of the pre-1920s, were revived by the alert speculators during the 1950s. If the abstracts of title submitted in connection with the 104 claims involved in this litigation are representative, then it would seem that the vast majority of the thousands of dormant oil shale claims (that would have remained dormant because the original locators had long since forgotten them or their heirs did not even know that they had inherited an interest) have been revitalized by the sharp speculators of the 1950s.

Not only have fractional interests in the claim been revived by searching out the heirs of one or two original locators and obtaining quit claim deeds at a cost of pennies per acre, but the speculators have allegedly obtained the dormant interests of the remaining locators or their heirs through questionable forfeiture proceedings. Under these proceedings the recent-day speculators, on the basis of their 1/8 or 1/16 fractional interest acquired as a result of their search efforts, allegedly perform $100.00 worth of assessment work on each claim for a one-year period, and then publish a notice in the local Grand Valley weekly newspaper calling on the parties who had located the claims some 30 or 40 years previously to contribute to the assessment work or lose their interest in the lands. After the original locators (who are probably deceased) fail to contribute to the assessment work, a quiet title suit is instituted, the original locators are served by publication, and a decree is obtained finding that the speculator has the entire record title interest in the claim.[24] After the

[24] In many instances the fractional interest that was acquired to support the forfeiture proceedings was an interest that had been declared null and void in the 1930s on an assessment work charge. On the basis of this interest the speculators purportedly forfeited out interests that had not

claim has been revived and the interests of all parties eliminated by the performance of annual assessment work for one year, no further assessment work is done by the speculator.

It would really be an extraordinary state of affairs to conclude that the United States, which holds the title to the lands in trust for the benefit of the people as a whole, had no jurisdiction to conduct expensive and time consuming proceedings, with due regard to the rights of everyone, in order to determine the validity of mining claims on the grounds of a failure to perform the annual assessment work as required by the Mineral Leasing Act, and thereby remove the cloud created by the thousands of claims plastered over the public domain, and at the same time recognizes that the recent-day speculators can accomplish the same thing; i.e. remove the cloud on their fractional interest by eliminating the remaining majority interests of parties who had long ago lost all interest in the claims, by performing the annual assessment work for one year, assessment work that was presumably not required, and by publishing a notice in the local weekly newspaper calling on the parties who had located the claims many years previously to contribute to the assessment work or lose their interests in the claims.

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been declared null and void in the 1930s because of a lack of proper service on the then mining claimants. If the interest was effectively declared null and void, then it would certainly seem that there was nothing to support the forfeiture proceedings, and the speculators obtained nothing by their proceedings. This would leave the interests that had not been declared null and void in the 1930s with the original locators or their heirs.

V. The 1960-1964 Period

A. *The Interest in Oil Shale*

Exhibit H shows that in the area known as the restricted Piceance Creek basin in Northwestern Colorado approximately 245,000 acres have been patented under oil shale mining claims since the first patent was issued following the Mineral Leasing Act of 1920, and that approximately 350,000 acres in this area are covered by unpatented oil shale mining claims. Exhibit H does not show the status of other oil shale lands in Northwestern Colorado. No reasonably accurate information is available concerning the number of acres covered by patented and unpatented oil shale claims in the states of Utah and Wyoming.

All of the 245,000 acres in the one area of Colorado were patented under the mining laws presumably on the basis that they were valuable for mining purposes. As yet, after some 45 years, no one has demonstrated that the oil shale lands have any value other than as a resource for possible future exploitation and development. The lands apparently have a tremendous value, as indicated by the fact that The Oil Shale Corporation paid some $600.00 per acre for 16 of the unpatented Bute claims *after* the Land Office Manager's decisions of February 1962 had been issued rejecting patent applications by reason of the old assessment work decisions (Exhibit 259—Abstract entry 318 and Exhibit J—page 4). The value is not however one of present use, but one of possible future use.

B. *The Res Judicata Decisions*

On February 16 and 23, 1962, the Manager of the Denver Land Office, Bureau of Land Manage-

ment, issued decisions rejecting 18 oil shale patent applications then pending in his office for the reason that all but five of the 266 oil shale claims for which patents were sought had been declared null and void in the early 1930s as a result of the then mining claimants' failure to maintain the claims by the performance of annual assessment work. The Manager held, in essence, that the decisions declaring the claims null and void were *res judicata*, and since the claims were no longer in existence the patent applications would have to be rejected.

The following patent applications were rejected:

C-07667 and C-09072 filed by Union Oil Company for a total of 116 claims.

C-016334, C-016671, C-029427, C-029428 and C-031342 filed by Tell Ertl for a total of 35 claims.

C-014671 filed by Weber Oil Company for a total of 31 claims.

C-0224459, C-022460, C-022461, C-028751, C-034270 and C-034271 filed by John W. Savage et al for a total of 43 claims.

C-030979 filed by Wasatch Development Company et al for a total of 19 claims.

C-018673 filed by Gabbs Exploration Company for a total of 7 claims.

C-045092 filed by Harlan H. Hugg et al for a total of 11 claims.

C-012327 filed by Pacific Oil Company for a total of 4 claims.

Appeals to the Director of the Bureau of Land Management were duly perfected by all of the patent applicants. However, the Secretary, realizing the importance of the issues involved and in an attempt to have a final departmental determination as soon as

possible, assumed jurisdiction over the cases and assigned them to the Solicitor for his consideration.

As the patent applicants' appeals were all directed to the Director of the Bureau of Land Management, the Solicitor, whose decision would be the final departmental action, gave the patent applicants the opportunity to file additional briefs. Thereafter, on April 17, 1964, the Solicitor issued a decision (71 I.D. 169) affirming the Manager's actions in all cases where there was no doubt but that the mining claimants in the 1930s had been properly served with notice of the assessment work contests, they having participated in the contest proceedings. The April 17 decision was final as to 27 claims.

As to the remaining claims, the Solicitor permitted them to submit evidence on the question of service of notice of the assessment work contests. A final decision as to that question and the disposition of the remaining claims was made by the Solicitor on July 30, 1965 (72 I.D. 313).

C. *The April 17, 1964 Instructions*

On April 17, 1964, the Secretary of the Interior wrote the Director, Bureau of Land Management (Exhibit TT) stating in part as follows with respect to oil shale claims:

> As to such cases which are not now the subject of contest or of patent application, the Bureau will, as soon as possible, initiate proceedings to test the adequacy of the discovery on which the claim is based and to assert any other ground for contest which might be justified by the facts.[25]

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[25] In *Davis* v. *Nelson* (1964) 329 F.2d 840, the United States Court of Appeals, Ninth Circuit, commented in part as follows:

[Footnote continued on page

At the time of these instructions there were two pending patent applications covering nine claims that had not previously been declared null and void on an assessment work charge. Accordingly, administrative proceedings were commenced against those nine claims charging, among other things, that the claims were not valid existing mining claims inasmuch as they had not been perfected by the discovery of a valuable mineral within the meaning of the mining laws as of February 25, 1920, and they were not presently valuable for mining purposes.

One of the basic contentions asserted by the Bureau of Land Management in the cases is that a reasonably prudent person would not from the time of the location of the claims to the present have been justified in the expenditure of his time and money in working the property with a reasonable expectation of success in developing a paying mine.[26]

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[25] [Continued]

It is our view, therefore, that the Secretary of the Interior, acting through defendant subordinate officials under the grant of authority to supervise public business on public lands, including mines, has power and authority to initiate a contest to see "that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States (1920), 252 U.S. 450, 460, 40 S.Ct. 410, 412, 64 L.Ed. 659; Duguid v. Best, supra. Such authority is not dependent upon the assertion by the United States of some other use for or the existence of some contemplated public project involving the public lands in question. Establishment of clear title to public lands is itself sufficient justification for the action. (page 846)

[26] In *Best* v. *Humboldt Placer Mining Co.* (1963) 371 U.S. 334, the Supreme Court stated in part as follows:

The discovery must be of such a character that "a person of ordinary prudence would be justified in the further

One of the basic contentions asserted by the mining claimants is that the Department of the Interior adopted a rule in the 1920s that was subsequently followed to the effect that oil shall mining claims could be patented under the mining laws, and the rule cannot now be changed to the prejudice of the parties who have recently acquired interests in unpatented oil shale claims. In other words, the United States is estopped from properly considering and applying the mining laws to oil shale claims because of the past practices of employees of the Department of the Interior in patenting oil shale claims.

The administrative contests have not as yet gone to trial before a hearing examiner under the Administrative Procedures Act.

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expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455, 457; Chrisman v. Miller, 197 U.S. 313, 322, 49 L.ed. 770, 773, 25 S. Ct. 468; Cameron v. United States, supra, (252 U.S. p. 459). A locator who does not carry his claim to patent does not lose his mineral claim, though he does take the risk that his claim will no longer support the issuance of a patent. (page 335, 336)

APPENDIX B

The Title History

I. The Bute Nos. 1 through 48.[1]

The Bute Nos. 1 through 48 oil shale placer mining claims were allegedly located in December of 1919 and January of 1920 (Exhibit 259—Abstract entries 19 through 66). Each of the claims covered ¼ of a section of land or 160 acres each. The claims covered all of Sections 7 through 18, inclusive in Township 4 South, Range 96 West. The claims were allegedly located by a group of nine individuals, with, however, only eight names being used on any one location certificate. The nine individuals and the claims on which their names appear are as follows:

Benton Cannon	1, , 3, 4, 5, 6, 7, 8, 9, , 11, 12, 13, 14, 15, 16, 17, 18, , 20, 21, 22, 23, 24, 25, 26, 27, , 29, 30, 31, 32, 33, 34, 35, 36, , 38, 39, 40, 41, 42, 43, 44, 45, , 47, 48
Charley Anderson	1, 2, 3, 4, 5, 6, 7, 8, , 10, 11, 12, 13, 14, 15, 16, 17, , 19, 20, 21, 22, 23, 24, 25, 26, , 28, 29, 30, 31, 32, 33, 34, 35, , 37, 38, 39, 40, 41, 42, 43, 44, , 46, 47, 48
Ethel McGahen	1, 2, 3, 4, 5, 6, 7, , 9, 10, 11, 12, 13, 14, 15, 16, , 18, 19, 20, 21, 22, 23, 24, 25, , 27, 28, 29, 30, 31, 32, 33, 34, , 36, 37, 38, 39, 40, 41, 42, 43, , 45, 46, 47, 48

[1] The claims involved in Civil Action 8680 are the Bute Nos. 1 through 19, 21 through 28, and 30 through 48. The Bute Nos. 20 and 29 are involved with other claims in Civil Action 9465.

J. C. Moore	1, 2, 3, 4, 5, 6, , 8, 9, 10, 11, 12, 13, 14, 15, , 17, 18, 19, 20, 21, 22, 23, 24, , 26, 27, 28, 29, 30, 31, 32, 33, , 35, 36, 37, 38, 39, 40, 41, 42, , 44, 45, 46, 47, 48
W. S. Furman	1, 2, 3, 4, 5, , 7, 8, 9, 10, 11, 12, 13, 14, , 16, 17, 18, 19, 20, 21, 22, 23, , 25, 26, 27, 28, 29, 30, 31, 32, , 34, 35, 36, 37, 38, 39, 40, 41, , 43, 44, 45, 46, 47, 48
James Murphy	1, 2, 3, 4, , 6, 7, 8, 9, 10, 11, 12, 13, , 15, 16, 17, 18, 19, 20, 21, 22, , 24, 25, 26, 27, 28, 29, 30, 31, , 33, 34, 35, 36, 37, 38, 39, 40, , 42, 43, 44, 45, 46, 47, 48
Frank Jackson	1, 2, 3, , 5, 6, 7, 8, 9, 10, 11, 12, , 14, 15, 16, 17, 18, 19, 20, 21, , 23, 24, 25, 26, 27, 28, 29, 30, , 32, 33, 34, 35, 36, 37, 38, 39, , 41, 42, 43, 44, 45, 46, 47, 48
Stephen A. Murphy	1, 2, , 4, 5, 6, 7, 8, 9, 10, 11, , 13, 14, 15, 16, 17, 18, 19, 20, , 22, 23, 24, 25, 26, 27, 28, 29, , 31, 32, 33, 34, 35, 36, 37, 38, , 40, 41, 42, 43, 44, 45, 46, 47,
Stephen A. Post	, 2, 3, 4, 5, 6, 7, 8, 9, 10, , 12, 13, 14, 15, 16, 17, 18, 19, , 21, 22, 23, 24, 25, 26, 27, 28, , 30, 31, 32, 33, 34, 35, 36, 37, , 39, 40, 41, 42, 43, 44, 45, 46, , 48

The locators claimed the discovery of a valuable mineral within the limits of each of the 48 mining

claims, and in effect asserted that the lands (7,680 acres) were valuable for mining purposes.[2]

The next entry following the location certificates that appears in the abstract of title with respect to the Bute claims is an instrument entitled "Notice in Lieu of Labor" which was filed for record on February 1, 1921 (Exhibit 259—Abstract entry 112). By this instrument one of the locators on behalf of himself and his associates claimed the benefits of a suspension of the requirement of annual assessment work on mining claims by Congress.[3]

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[2] In *Mulkern* v. *Hammitt*, 326 F.2d 896, 897, the United States Court of Appeals, Ninth Circuit, commented in part as follows:

> "The 'location' of a mineral claim upon the public lands of the United States is, in effect, a unilateral act by the locator. It indicates that, in his opinion, there are minerals upon the land which are susceptible of profitable exploration. That opinion may, of course, be, upon examination by less optimistic persons, regarded as ill-founded. If it is, the Government must have the right to clear the title and the right to the possession of its land from a useless and annoying incumbrance."

[3] By a Joint Resolution approved November 13, 1919 (41 Stat. 354) Congress provided:

> "That the provisions of section 2324 of the Revised Statutes of The United States, which requires on each mining claim located and until a patent has been issued therefor, not less than $100 worth of labor to be performed, or improvements aggregating such amount to be made each year, be, and the same is hereby suspended as to all mining claims in the United States, including Alaska, during the calendar year 1919: *Provided*, That every claimant of any such mining claim in order to obtain the benefits of this resolution shall file, or cause to be filed in the office where the location notice or certificate is recorded on or before December 31, 1919, a notice of his desire to hold said mining claim under this resolution."

No instruments were filed for record concerning the Bute claims between February 1, 1921 and July 23, 1954. In fact the owners of the claims did not even bother to record notices in lieu of annual assessment work during periods of suspension by Congress.[4]

The next entry in the abstract following the instrument recorded on February 1, 1921 is a quitclaim deed dated July 21, 1954, which was recorded on July 23, 1954. By this instrument James Murphy, apparently one of the original locators, conveyed all of his interest in the Bute claims to Tell Ertl (Exhibit 259—Abstract entry 116). At the time of the conveyance, James Murphy, as one of the parties who allegedly located 43 of the claims some 34 years previously, held the record title to a 1/8 interest in

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[4] Other provisions suspending the requirement of annual assessment work on mining claims for the periods listed below were contained in the Acts spceified:

July 1, 1932 to July 1, 1933 — Act of May 18, 1933, 48 Stat. 72.

July 1, 1933 to July 1, 1934 — Act of May 15, 1934, 48 Stat. 777.

July 1, 1934 to July 4, 1935 — Act of June 13, 1935, 49 Stat. 337.

July 1, 1935 to July 1, 1936 — Act of April 24, 1936, 49 Stat. 1238.

July 1, 1936 to July 1, 1937 — Act of June 24, 1937, 50 Stat. 306.

July 1, 1937 to July 1, 1938 — Act of June 29, 1938, 52 Stat. 1243.

July 1, 1941 to July 1, 1943 — Act of May 7, 1942, 56 Stat. 271.

July 1, 1943 to July 1, 1947 — Act of May 3, 1943, 57 Stat. 74.

July 1, 1947 to July 1, 1948 — Act of June 17, 1948, 62 Stat. 475.

July 1, 1948 to July 1, 1949 — Act of June 17, 1949, 63 Stat. 200.

claims covering 6,880 acres. Tell Ertl paid James Murphy $100.00 for his interest in the Bute claims (Exhibit J—page 6).

The next entry in the abstract involving the Bute claim is a quitclaim deed dated September 23, 1954, which was recorded on October 23, 1954. By this instrument, which was acknowledged in California, Stephen A. Murphy, apparently one of the original locators, conveyed all of his interest in the Bute claims to Tell Ertl (Exhibit 259—Abstract entry 119). At the time of this conveyance, Stephen A. Murphy, as one of the original locators held the record title to a 1/8 interest in 42 of the Bute claims. Tell Ertl paid Stephen A. Murphy $100.00 for his interest in the Bute claims (Exhibit J—page 6).

By a quitclaim deed dated December 15, 1954 and recorded on April 18, 1955, one R. L. Laurence, of San Francisco, California, who is a stranger to the title, but presumably an heir of an original locator, or an heir of an heir of an original locator, conveyed all of his interest in the Bute claims to Tell Ertl (Exhibit 259—Abstract entry 121). The interest, if any, of R. L. Laurence in the 48 Bute claims cannot be determined from the abstract. In any event Tell Ertl acquired any interest that R. L. Laurence held in the Bute claims and 18 other oil shale placer mining claims for a consideration of $100.00 (Exhibit J—page 6).

On July 2, 1955 Tell Ertl filed for record an instrument entitled "Affidavit of Annual Labor" (Exhibit 259—Abstract entry 123). This affidavit, which covered the 48 claims together with other oil shale placer mining claims alleged in part as follows:

> "That more than one hundred dollars worth of work and improvements were performed and made during the year commencing July 1, 1954,

and ending July 1, 1955, upon or for the benefit of each of the following named and described placer mining claims."

* * * *

"Such expenditures were made at the sole expense of Tell Ertl of Grand Valley, Colorado, one of the co-owners of said Mining Claims, *for the purpose of compliance with the law with reference to unpatented mining claims*, and to secure the benefits thereof for himself." (Underlining added.)

On July 15, 1955 Tell Ertl commenced the publication of a Forfeiture Notice in the Grand Valley News, a small weekly newspaper published in the town of Grand Valley, Colorado (Exhibit 259—Abstract entry 139).[5] The forfeiture notice was directed to each of the original group of nine locators and all unknown successors in interest of the original locators, with the exception of the two Murphys who had quitclaimed to Tell Ertl. The forfeiture notice was based on assessment work allegedly done for the year ending July 1, 1955, and stated in part as follows:

"Such expenditures were made in compliance with Title 30, Sec. 28, U. S. C., and if, at the expiration of 90 days after this notice, you shall fail or refuse to contribute your proportion of the expenditures required by said section as to any claim or claims with reference to which you have or claim interest as co-owner or otherwise, your respective interests in said claim or claims will become the property of Tell Ertl the co-owner who made such expenditures."

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[5] The 1966 edition of Rand McNally Road Atlas shows a population of 245 for the town of Grand Valley, Colorado.

The forfeiture proceedings appear to have been based on the 2/8 interest obtained by Tell Ertl from James Murphy and Stephen A. Murphy in the claims in which they were common locators. In other words, Tell Ertl, after obtaining a 2/8 record title interest in the Bute claims, located in the names of James Murphy and Steven A. Murphy (and a 1/8 interest in the claims, in which only one of the Murphys appeared as a locator), allegedly performed the assessment work on the claims for the one-year period ending July 1, 1955, and then proceeded to forfeit out the remaining 6/8 (or 7/8) record title interest in the claims.[6]

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[6] The dissenting opinion in the case of *Hamilton* v. *Ertl*, 360 P.2d 660, which involved forfeiture proceedings by Tell Ertl in connection with 67 oil shale placer mining claims known as the Pueblo group, the Cedar group, the Nancy group and the Helen Agnes group, reads in part as follows:

> "Thus whether the Congress so intended, it appears that today by virtue of the saving clause in the Leasing Act and the decisions in Wilbur and Ickes supra the owners of oil shale claims find it possible to hold their claims awaiting perfection of technological processes for refining which will allow oil from shale to compete with liquid petroleum, without need to perform annual assessment work, the reason being that the deposits have been withdrawn from public entry so cannot be relocated and the Government itself cannot challenge the ownership for non-performance."
>
> * * * *
>
> "... In my view Ertl was a mere volunteer and a donor of his work to the benefit of all his co-owners because the work he performed did not have to be done. ..."
>
> "All of the text and case law which I have found is to the effect that in order for one co-owner to forfeit out other co-owners *there must have existed the necessity for doing the work* and if it is not necessary to do the work in order to protect the title, there is no right of forfeiture."

By a quitclaim deed dated September 27, 1955, which was recorded on November 14, 1955, one George D. Post conveyed his interest in the Bute claims and other oil shale placer mining claims to one H. A. Dutton, Jr. (Exhibit 259—Abstract entry 127). The abstract shows that George D. Post was one of the heirs of Stephen A. Post who was one of the original locators, and that Stephen A. Post died intestate on March 5, 1950, at Santa Rosa, California (Exhibit 259—Abstract entry 150).

By an affidavit dated January 13, 1956, entitled "Proof of Non-Contribution" Tell Ertl alleged that no co-owner named in the forfeiture notice had contributed to the expenditures for assessment work on the Bute claims for the year ending July 1, 1955 (Exhibit 259—Abstract entry 139).

On May 7, 1956, a quiet title decree was issued by the District Court, Rio Blanco County, Colorado, finding that Tell Ertl was the owner of all interests in the Bute placer mining claims Nos. 1 through 48 (Exhibit 259—Abstract entry 144). The quiet title action named all of the original group of nine locators with the exception of the two Murphys who had quitclaimed to Tell Ertl.[7]

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[7] The contest file for contest 11757 (Exhibit I-1) indicates the following with respect to certain of the original locators named by Tell Ertl in the forfeiture proceedings and the quiet title proceedings:

(a) That Benton Cannon died December 29, 1927, leaving a will which was filed February 24, 1928, and probated in Mesa County, Colorado, and that his heirs were his widow Evelyn Cannon, and two daughters, Eva and Helen Cannon. That Mrs. Cannon was receiving mail for herself and her two daughters in Ithaca, New York, in 1930. The will is Exhibit 260 in this proceeding and is being used by Tell Ertl in an attempt to establish that proper

On January 25, 1957, Tell Ertl conveyed all of his interest in the Bute claims, together with other oil shale placer mining claims, to Energy Resources Technology Land, Inc. (ERTL), a Colorado corporation (Exhibit 259—Abstract entry 149).

By a deed dated July 10, 1959, Energy Resources Technology Land, Inc. conveyed the Bute Nos. 33 through 48 to H. A. Dutton, Jr. (Exhibit 259—Abstract entry 178), and by an instrument dated July 13, 1959, Energy Resources Technology Land, Inc. (ERTL) obtained a conveyance from H. A. Dutton, Jr. of all of his interest in the Bute Nos. 1 through 32 and other oil shale placer mining claims (Exhibit 259—Abstract entry 177).

By a deed dated September 23, 1960, H. A. Dutton, Jr. conveyed the Bute Nos. 33 through 48 to Joe T. Juhan (Exhibit 259—Abstract entry 183).

By an instrument dated June 12, 1963, Joe T. Juhan and The Oil Shale Corporation entered into an option agreement covering the Bute Nos. 33 through 48 (Exhibit 259—Abstract entry 318), and on July 9, 1964, The Oil Shale Corporation exercised

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service was not obtained by the Government in the contest proceedings in the 1930s.

(b) That J. C. Moore had died sometime prior to 1931 and that his heirs were his widow Mrs. Harry Kelly and his minor daughter, Colleen Moore. That the widow was receiving mail for herself and her daughter in Grand Junction, Colorado, in 1931.

(c) That Ethel McGahen had married and her married name was Ethel Laurence. That Ethel McGahen Laurence was receiving mail in San Pedro, California, in 1931.

In addition, as noted previously, the abstract shows that Stephen A. Post, one of the original locators named in the forfeiture and quiet title proceedings had died in 1950 in Santa Rosa, California.

its option. The purchase price, payable to Joe T. Juhan in installments was $1,536,000 (Exhibit J—page 4).[8]

By an instrument dated September 20, 1963, Energy Resources Technology Land, Inc. and The Oil Shale Corportion entered into a lease and option arrangement covering the Bute Nos. 1 through 32 and other oil shale placer mining claims[9] (Exhibit 259—Abstract entry 319). The rental payable under this agreement to Energy Resources Technology Land, Inc. is $148,000 per annum (Exhibit J—page 4).

The only instruments shown in the abstract of title, from the time of the location of the claims, some 45 years ago, relating to annual assessment work are (1) the Notice in Lieu of Labor recorded on February 1, 1921, and (2) the Affidavit of Annual Labor recorded on July 2, 1955, by Tell Ertl as the basis for his forfeiture proceedings. No instruments re-

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[8] The Oil Shale Corporation paid $600.00 per acre for 16 of the Bute claims. Tell Ertl in 1954 obtained interests in the 48 Bute claims on which to base his forfeiture proceedings for $300 or .39¢ per acre.

[9] The other oil shale placer mining claims are the Atlas Nos. 1 through 18, The Camp Bird Nos. 1 through 20, the Liberty Bell Nos. 1 through 12, and the Tom Boy Nos. 1 through 12. All of these claims were obtained by Tell Ertl through forfeiture proceedings similar to the procedure followed by Tell Ertl with respect to the Bute Nos. 1 through 48. All of the claims were declared null and void in the 1930s for failure to perform assessment work and are the subject of pending actions to establish the validity of the claims. The Atlas Nos. 1, 2, 3, 7, 9, 10, 12, 17, and 18, all of the Camp Bird, and the Bute Nos. 1 through 19, 21 through 28, and 30 through 48 are involved in Civil Action 8680. The Atlas Nos. 4, 5, 6, 8, 11 and 13 through 16, the Bute Nos. 20 and 29, all of the Liberty Bell, and all of the Tom Boy claims are involved in Civil Action 9465.

lating to assessment work were recorded subsequent to the forfeiture proceedings. Apparently no need was seen to further volunteer the performance of annual assessment work.

II. The Atlas Nos. 1 through 18.[10]

The Atlas Nos. 1 through 18 oil shale placer mining claims were allegedly located in December of 1919 (Exhibit 259—Abstract entries 1 through 18). Each of the claims covered 1/4 of a section of land or 160 acres each. The claims covered all of Section 10, the SW¼ of Section 12, the W½ of Section 13, all of Section 14, and all of Section 15, in Township 4 South, Range 95 West. The claims were allegedly located by a group of nine individuals, with, however, only eight names being used on any one location certificate. The nine individuals and the claims on which their names appear are as follows:

W. S. Furman	1, , 3, 4, 5, 6, 7, 8, 9, 10, , 12, 13, 14, 15, 16, 17, 18
Marcedus Murphy	1, 2, , 4, 5, 6, 7, 8, 9, 10, 11, , 13, 14, 15, 16, 17, 18
Iris Campbell	1, 2, 3, , 5, 6, 7, 8, 9, 10, 11, 12, , 14, 15, 16, 17, 18
Ethel McGahen	1, 2, 3, 4, , 6, 7, 8, 9, 10, 11, 12, 13, , 15, 16, 17, 18
Emma J. Boyd	1, 2, 3, 4, 5, , 7, 8, 9, 10, 11, 12, 13, 14, , 16, 17, 18
Albert C. Coleman	1, 2, 3, 4, 5, 6, , 8, 9, 10, 11, 12, 13, 14, 15, , 17, 18
Harry N. Longwell	1, 2, 3, 4, 5, 6, 7, , 9, 10, 11, 12, 13, 14, 15, 16, , 18
Stephen A. Post	1, 2, 3, 4, 5, 6, 7, 8, , 10, 11, 12, 13, 14, 15, 16, 17,
J. C. Moore	, 2, 3, 4, 5, 6, 7, 8, 9, , 11, 12, 13, 14, 15, 16, 17, 18

Four of these original locators, Furman, McGahen, Moore and Post were also original locators of the Bute claims.

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[10] The claims involved in Civil Action 8680 are the Atlas Nos. 1, 2, 3, 7, 9, 10, 12, 17 and 18. The Atlas Nos. 4, 5, 6, 8, 11, and 13 through 16 are involved with other claims in Civil Action 9465.

The locators claimed the discovery of a valuable mineral within the limits of each of the 18 mining claims, and in effect asserted that the lands (2,880 acres) were valuable for mining purposes.

The next entry following the location certificates that appears in the abstract of title with respect to the Atlas claims is an instrument entitled "Notice in Lieu of Labor" which was filed for record on February 1, 1921 (Exhibit 259—Abstract entry 111). By this instrument one of the locators on behalf of himself and his associates claimed the benefits of a suspension by Congress of the requirement of annual assessment work on mining claims.[11]

No instruments were filed for record concerning the Atlas claims between February 1, 1921, and August 5, 1954. As was also true with regard to the Bute claims, the owners of the Atlas claims did not even bother to record notices in lieu of annual assessment work during periods of suspension by Congress.[12]

The next entry in the abstract following the instrument recorded on February 1, 1921 is a quitclaim deed dated August 3, 1954, which was recorded on August 5, 1954. By this instrument Iris C. Robinson, formerly Iris Campbell, apparently one of the original locators, conveyed all of her interest in the Atlas claims to Tell Ertl (Exhibit 259—Abstract entry 117.). At the time of the conveyance, Iris C. Robinson, as one of the parties who allegedly located

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[11] The Joint Congressional Resolution of 1919 (41 Stat. 354) providing for the suspension of the requirement of assessment work on mining claims is set forth in footnote 3 in connection with the Bute claims.

[12] Acts providing for the further suspension of assessment work on mining claims in years after 1919 are listed in footnote 4 under the Bute claims.

16 of the claims some 34 years previously, held the record title to a 1/8 interest in claims covering 2,560 acres. Tell Ertl paid Iris C. Robinson $100.00 for her interest in the Atlas claims (Exhibit J—page 6).

By a quitclaim deed dated July 28, 1954, and recorded on August 5, 1954, Marcedus Murphy, apparently one of the original locators, conveyed all of her interest in the Atlas claims to Tell Ertl (Exhibit 259—Abstract entry 118). At the time of this conveyance, Marcedus Murphy, as one of the original locators held the record title to a 1/8 interest in 16 of the Atlas claims. Tell Ertl paid Marcedus Murphy $100.00 for her interest in the Atlas claims (Exhibit J—page 6).

By a quitclaim deed dated December 15, 1954, and recorded on April 18, 1955, one R. L. Laurence, of San Francisco, California, who is a stranger to the title, but presumably an heir of an original locator, or an heir of an heir of an original locator, conveyed all of his interest in the Atlas claims to Tell Ertl (Exhibit 259—Abstract entry 121). The interest, if any, of R. L. Laurence in the 18 Atlas claims cannot be determined from the abstract. In any event Tell Ertl acquired any interest that R. L. Laurence held in the Atlas claims and in the 48 Bute claims for a consideration of $100.00 (Exhibit J—page 6).

On July 2, 1955 Tell Ertl filed for record an instrument entitled "Affidavit of Annual Labor" (Exhibit 259—Abstract entry 122). This affidavit, covering the 18 Atlas claims, alleged in language similar to the excerpts set forth in connection with the Bute claims, that during the year from July 1, 1954 to July 1, 1955 more than one hundred dollars of work had been performed upon or for the benefit of each of the 18 Atlas claims. The affidavit also alleged that these expenditures had been made at the

sole expense of Tell Ertl, one of the co-owners of the Atlas claims, "for the purpose of compliance with the law with reference to unpatented mining claims."

On July 8, 1955 Tell Ertl commenced the publication of a Forfeiture Notice in the Grand Valley News, a small weekly newspaper published in the town of Grand Valley, Colorado (Exhibit 259—Abstract entry 138). The forfeiture notice was directed to each of the original group of nine locators with the exception of Murphy and Robinson, who had quitclaimed to Tell Ertl, and to all unknown successors in interest of the original locators. In language similar to the excerpt from the forfeiture notice pertaining to the Bute claims, the publication stated Tell Ertl's intention to forfeit out any co-owners of the Atlas claims who failed to contribute their proportion of assessment work expenditures within 90 days.

The forfeiture proceedings pertaining to the Atlas claims followed the same pattern as the proceedings involving the Bute claims. After obtaining a 2/8 record title interest in the claims located in the names of Iris Campbell (Robinson) and Marcedus Murphy (and a 1/8 interest in the claims in which Campbell and Murphy were not common locators), Tell Ertl allegedly performed the assessment work on the claims for the one-year period ending July 1, 1955, and then proceeded to forfeit out the remaining 6/8 (or 7/8) record title interest in the claims.

By a quitclaim deed dated September 27, 1955 George D. Post, (apparently one of the heirs of Stephen A. Post, who was an original locator and also one of the heirs of another original locator, Emma J. Boyd) conveyed the interest that he obtained as an heir of Stephen A. Post to H. A. Dutton, Jr. This

amounted to a 3/32 interest to Dutton [13] (Exhibit 259—Abstract entry 127).

By a quitclaim deed dated November 10, 1955, one Beatrice Post, apparently the heir of W. H. Post, who was apparently one of the heirs of an original locator, Emma J. Boyd, conveyed the interest that Post obtained from Boyd and the interest that she obtained from Post to H. A. Dutton, Jr. This amounted to a 1/16 interest to Dutton [14] (Exhibit 259—Abstract entry 126).

By an affidavit entitled "Proof of Non-Contribution", dated January 13, 1956, Tell Ertl alleged that no co-owner named in the forfeiture notice had con-

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[13] Emma J. Boyd, one of the original locators named in the forfeiture proceedings, apparently died intestate on September 24, 1921, in Grand Junction, Colorado (Exhibit 259—Abstract entry 150). No administration of her estate was granted in Colorado. On May 18, 1959, the District Court, Rio Blanco County, Colorado determined that Emma J. Boyd died possessed of a 1/8 interest in the Atlas claims and that her heirs at law were Stephen A. Post and W. H. Post with each being entitled to a ½ interest.

Stephen A. Post one of the original locators and an heir of Emma J. Boyd apparently died intestate on March 5, 1950, at Santa Rosa, California (Exhibit 259—Abstract entry 150). No administration of his estate was granted in Colorado. On May 18, 1959, the District Court, Rio Blanco County, Colorado, determined that Stephen A. Post died possessed of a 3/16 interest in the Atlas claims and that his sole and only heirs at law were Lillian Post and George D. Post with each being entitled to a ½ interest.

[14] W. H. Post apparently died leaving a will on February 10, 1938 (Exhibit 259—Abstract entry 151). The will was probated in Mesa County, Colorado in 1938 and filed for record in Rio Blanco County in 1959. By the terms of this will, the widow Beatrice W. Post acquired any interest which W. H. Post might have had in the Atlas claims as an heir of Emma J. Boyd.

tributed to the expenditures for assessment work for the year ending July 1, 1955 (Exhibit 259—Abstract entry 138).

On May 7, 1956 a quiet title decree was issued by the District Court, Rio Blanco County, Colorado, finding that Tell Ertl was the owner of all interests in the Atlas placer mining claims Nos. 1 through 18 (Exhibit 259—Abstract entry 144). The quiet title action named all of the original group of nine locators of the Atlas claims with the exception of Iris Robinson and Marcedus Murphy, who had quitclaimed to Tell Ertl. It also named H. A. Dutton, Jr., as well as all unknown persons who claimed any interest in the subject matter of the action.[15]

On January 25, 1957, Tell Ertl conveyed all of his interest in the Atlas claims, together with his interest in the Bute claims and in other oil shale placer mining claims, to Energy Resources Technology Land, Inc. (ERTL), a Colorado corporation (Exhibit 259—Abstract entry 149).

By an instrument dated July 13, 1959, Energy Resources Technology Land, Inc. obtained a conveyance from H. A. Dutton, Jr. of all of his interest in the Atlas Nos. 1 through 18 and other oil shale placer mining claims (Exhibit 259—Abstract entry 177); and by a deed dated July 10, 1959, Energy Resources

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[15] Dutton's efforts in locating the heirs of original locators, in obtaining conveyances and in placing the necessary estate procedings on record were apparently wasted inasmuch as the interests of the original locators obtained by Dutton were forfeited out by Tell Ertl.

Again, as with the Bute claims the contest files for Contest 11759 (Exhibit I-2) involving the Atlas claims contained pertinent information as to the existence and whereabouts of the original locators and heirs of original locators which was ignored by Tell Ertl in his forfeiture and quiet title proceedings directed only to the original locators.

Technology Land, Inc. conveyed the Bute Nos. 33 through 48 claims to H. A. Dutton, Jr. (Exhibit 259—Abstract entry 178).

By an instrument dated September 20, 1963 Energy Resources Technology Land, Inc. and The Oil Shale Corporation entered into a lease and option arrangement covering the Atlas Nos. 1 through 18 and other oil shale placer mining claims [16] (Exhibit 259—Abstract entry 319). The rental payable under this agreement to Energy Resources Technology Land, Inc. is $148,000 per annum (Exhibit J—page 4).

As is also true, as previously stated, with respect to the Bute claims, the only instruments shown in the abstract of title, from the time of the location of the Atlas claims, some 45 years ago, relating to annual assessment work are (1) the Notice in Lieu of Labor recorded on February 1, 1921 and (2) the Affidavit of Annual Labor recorded on July 2, 1955 by Tell Ertl as the basis for his forfeiture proceedings. No instruments relating to assessment work were recorded subsequent to the forfeiture proceedings. Apparently no need was felt to further volunteer the performance of annual assessment work.

III. The Camp Bird Nos. 1 through 20.[17]

The Camp Bird Nos. 1 through 20 oil shale placer mining claims were allegedly located in January of 1920 (Exhibit 259—Abstract entries 67 through 86). Each of the mining claims covered 1/4 of a section of land or 160 acres each. The claims covered the W½ and SE¼ of Section 2, all of Section 3, all of

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[16] All of the claims involved in the conveyance are set forth in footnote 9 in connection with the Bute claims.

[17] All of the Camp Bird claims are involved in Civil Action 8680.

Section 4, all of Section 9, all of Section 16, and the SE¼ of Section 17, in Township 4 South, Range 95 West. The claims were allegedly located by Leroy C. Albright, J. E. Billings, John E. Lowe, J. C. Moore, Stephen A. Post, Charley Anderson, Emma J. Boyd, and Charles W. Reed. Two of these original locators, Boyd and Post, were also original locators on most of the 18 Atlas claims. Three of these original locators, Post, Moore, and Anderson, were also original locators on most of the 48 Bute claims.

The locators claimed the discovery of a valuable mineral within the limits of each of the 20 mining claims, and in effect asserted that the lands (3,200 acres) were valuable for mining purposes.

The locators of the Camp Bird claims failed to file any certificate in lieu of annual labor to take advantage of the 1919 Congressional suspension of the requirement of performing annual assessment work on mining claims as was done with respect to the Bute and Atlas claims.[18] Nor were any certificates filed with respect to any of the later Congressional suspensions of the assessment work requirement.[19]

After the filing of the location certificates on January 9, 1920, no instruments were filed for record concerning the Camp Bird claims until November 14, 1955.

By a quitclaim deed dated November 10, 1955, which was recorded on November 14, 1955, Beatrice Post, the heir of W. H. Post, who was one of the heirs of Emma J. Boyd, an original locator, conveyed the interest that (W. H.) Post obtained from Boyd

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[18] The Joint Resolution approved November 13, 1919, by Congress (41 Stat. 354) is set forth in footnote 3, *supra*.

[19] Acts providing for the suspension by Congress of the annual assessment work requirement on mining claims are set forth in footnote 4, *supra*.

and the interest that she (Beatrice Post) obtained from Post, to H. A. Dutton, Jr. (Exhibit 259—Abstract entry 126), giving Dutton a 1/16 interest in 3,200 acres.[20]

By a quitclaim deed dated September 27, 1955, which was recorded on November 14, 1955, George D. Post, one of the heirs of Stephen A. Post, who was an original locator and one of the heirs of Emma J. Boyd, another original locator, conveyed the interest that George Post obtained as an heir of Stephen Post to H. A. Dutton, Jr. (Exhibit 259—Abstract entry 127), giving Dutton a 3/32 interest in 3,200 acres.[21]

By a quitclaim deed dated February 20, 1956, and recorded March 14, 1956, R. C. Albright, allegedly the son and sole heir of Leroy C. Albright, an origi-

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[20] Emma J. Boyd apparently died intestate on September 29, 1921, in Grand Junction, Colorado (Exhibit 259—Abstract entry 150). No administration of her estate was granted in Colorado. On May 18, 1959, the District Court, Rio Blanco County, Colorado, determined that Emma J. Boyd died possessed of a 1/8 interest in the Camp Bird claims and that her heirs at law were W. H. Post and Stephen A. Post with each being entitled to a 1/2 interest.

W. H. Post apparently died leaving a will on February 10, 1938 (Exhibit 259—Abstract entry 151). The will was probated in Mesa County, Colorado, in 1938, but was not filed for record in Rio Blanco County until 1959. The widow Beatrice W. Post acquired any interest he might have had in the Camp Bird claims.

[21] Stephen A. Post apparently died intestate on March 5, 1950, at Santa Rosa, California (Exhibit 259—Abstract entry 150). No administration of his estate was granted in Colorado. On May 18, 1959, the District Court, Rio Blanco County, Colorado, determined that Stephen A. Post died possessed of a 3/16 interest in the Camp Bird claims, and that his sole and only heirs at law were Lilliam Post and George D. Post with each being entitled to a 1/2 interest.

nal locator, conveyed all of his interest in the Camp Bird claims to Tell Ertl (Exhibit 259—Abstract entry 141). Tell Ertl paid R. C. Albright $100.00 for his interest in the Camp Bird claims (Exhibit J—page 6).

By a quitclaim deed dated April 12, 1956, and recorded April 18, 1956, Verna C. Reed, apparently the widow of Charles W. Reed, an original locator, conveyed all of her interest in the Camp Bird claims to Tell Ertl for $100.00 (Exhibit 259—Abstract entry 142, Exhibit J—page 6)[22]

By a quitclaim deed dated April 19, 1956, and recorded April 30, 1956, Iva M. Milne (formerly Iva M. Lowe) and Charles E. Lowe, allegedly the son and heir of John E. Lowe, an original locator, conveyed all of their interest in the Camp Bird claims to Tell Ertl for $100.00 (Exhibit 259—Abstract entry 143, Exhibit J—page 6).

By a quitclaim deed dated April 19, 1956, and recorded April 30, 1956, Mrs. J. E. Billings, allegedly the widow and heir of J. E. Billings, an original locator, conveyed all of her interest in the Camp Bird claims to Tell Ertl for $100.00 (Exhibit 259—Abstract entry 137, Exhibit J—page 6).

On June 7, 1956, Tell Ertl filed for record an instrument entitled "Affidavit of Annual Labor" (Exhibit 259—Abstract entry 145). This affidavit, covering the 20 Camp Bird claims, alleged in language similar to that used in affidavits filed in connection with the Atlas and Bute claims, that during the year

[22] Charles W. Reed, one of the original locators, apparently died leaving a will on May 31, 1938 (Exhibit 259—Abstract entry 152). The will was probated in Mesa County, Colorado, in 1938, but was not filed for record in Rio Blanco County until 1957. By the terms of this will Reed's widow, Verna C. Reed, acquired any interest he might have had in the Camp Bird claims.

from July 1, 1955 to June 30, 1956, more than one hundred dollars worth of work had been performed upon or for the benefit of each of the 20 Camp Bird claims. The affidavit also alleged that these expenditures had been made at the sole expense of Tell Ertl, one of the co-owners of the Camp Bird claims, "for the purpose of complying with the law with reference to unpatented mining claims."

On August 24, 1956, Tell Ertl commenced the publication of a Forfeiture Notice in the Grand Valley News, a small weekly newspaper published in the town of Grand Valley, Colorado (Exhibit 259—Abstract entry 147). The forfeiture notice was directed to each of the original group of eight locators with the exception of Charles W. Reed, and in addition to H. A. Dutton, Jr., and to all unknown successors in interest of the original locators. In language similar to that used in the forfeiture notices pertaining to the Bute and Atlas claims, the publication stated Tell Ertl's intention to forfeit out any co-owners of the Camp Bird claims who failed to contribute their proportion of assessment work expenditures within 90 days.

The forfeiture proceedings pertaining to the Camp Bird claims followed a pattern similar to the proceedings involving the Bute and Atlas claims. After obtaining from the alleged heirs of original locators an apparent 4/8 record title interest in claims covering 3,200 acres by a total expenditure of $400.00 Tell Ertl allegedly performed at least $100.00 worth of assessment work on each of the 20 claims during the one-year period ending June 30, 1956, and then proceeded to forfeit out others holding record title interests in the claims.

According to an affidavit dated February 25, 1957, however, one of the record title holders, H. A. Dut-

ton, Jr., did answer the forfeiture notice within 90 days. Dutton, who had obtained a record 5/32 interest in the Camp Bird claims by virtue of two quitclaim deeds executed in 1955 by the heirs of original locators, contributed a proportion of the alleged assessment work expenditures and retained his title interest in the claims (Exhibit 259—Abstract entry 147).

On May 22, 1957, a quiet title decree was issued by the District Court, Rio Blanco County, Colorado, finding that Tell Ertl was the owner of an undivided 3/4 interest and H. A. Dutton, Jr. the owner of an undivided 1/4 interest in the Camp Bird placer mining claims (Exhibit 259—Abstract entry 148). The quiet title action named all of the original group of eight locators of the Camp Bird claims except Charles W. Reed, as well as all unknown persons who claimed any interest in the subject matter of the action.

On January 25, 1957, Tell Ertl conveyed all of his interest in the Camp Bird claims, together with his interest in the Bute claims, the Atlas claims, and other oil shale placer mining claims, to Energy Resources Technology Land, Inc. (ERTL), a Colorado corporation (Exhibit 259—Abstract entry 149).

By an instrument dated July 13, 1959, Energy Resources Technology Land, Inc. obtained a conveyance from H. A. Dutton, Jr. of all of his interest in the Camp Bird Nos. 1 through 20 and other oil shale placer mining claims (Exhibit 259—Abstract entry 177); and by a deed dated July 10, 1959, Energy Resources Technology Land, Inc. conveyed the Bute Nos. 33 through 48 claims to H. A. Dutton, Jr. (Exhibit 259—Abstract entry 178).

By an instrument dated September 20, 1963, Energy Resources Technology Land, Inc. and The Oil Shale Corporation entered into a lease and option

arrangement covering the Camp Bird Nos. 1 through 20 and other oil shale placer mining claims[23] (Exhibit 259—Abstract entry 319). The rental payable under this agreement to Energy Resources Technology Land, Inc. is $148,000 per annum (Exhibit J—page 4).

The only instrument shown in the abstract of title, from the time of the location of the Camp Bird claims, some 45 years ago, relating to annual assessment work is the Affidavit of Annual Labor recorded on June 27, 1956, by Tell Ertl as the basis for his forfeiture proceedings. No instruments relating to assessment work were recorded subsequent to the forfeiture proceedings. Apparently no need was seen to further volunteer the performance of annual assessment work.

IV. The Carbon Nos. 1 through 8 and the Elizabeth Nos. 1 through 12.[24]

The Carbon Nos. 1 through 8 oil shale placer mining claims were allegedly located on April 10, 1918 (Exhibit G—Abstract entries 1 through 8). Each of the claims covered 1/4 of a section of land or 160 acres each. The eight claims covered all of Sections 32 and 33, Township 4 South, Range 97 West. The claims were allegedly located by F. N. Juhan, Elizabeth Juhan, Joe Juhan, E. E. Fordham, Winnifred Fordham, Genevieve Fordham and Jack Montgomery.

The Elizabeth Nos. 1 through 8 oil shale placer mining claims were allegedly located on May 18,

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[23] All of the claims involved in the lease and option arrangement are set forth in footnote 9, *supra*.

[24] The claims involved in Civil Action 8685 are the Carbon Nos. 1 through 5 and the Elizabeth Nos. 1, 2, and 4 through 12.

1918 (Exhibit G—Abstract entries 9 through 19). Each of the claims covered 1/4 of a section of land, the eight claims covering all of sections 35 and 36, Township 4 South, Range 97 West. The eight claims were allegedly located by F. N. Juhan, Elizabeth Juhan, Joe T. Juhan, James E. Ford, Doris Ford, Mabel M. Ford, and Georgia May Williams.

The Elizabeth Nos. 9 through 12 oil shale placer mining claims were allegedly located on May 18, 1918. Each of the claims covered 1/4 of a section of land, with the four claims covering all of Section 34, Township 4 South, Range 97 West. The four claims were allegedly located by F. N. Juhan, Elizabeth Juhan, Joe T. Juhan, E. E. Fordham, Winnifred Fordham, Genevieve Fordham, James E. Ford and Mabel M. Ford.

The locators of the Carbon and Elizabeth claims claimed the discovery of a valuable mineral within the limits of each of the eight Carbon and twelve Elizabeth mining claims, and in effect asserted that the lands (3,200 acres) were valuable for mining purposes.

By a quitclaim deed dated April 25, 1918 (15 days after the claims were located) and recorded January 27, 1919, seven of the locators of the Carbon Nos. 1 through 8 conveyed all their interests in the claims to the eighth locator, E. E. Fordham (Exhibit C—Abstract entry 24).

By a quitclaim deed dated August 27, 1918 and recorded January 27, 1919, seven of the locators of the Elizabeth Nos. 1 through 8 conveyed all of their interests in the claims to the eighth locator, F. N. Juhan (Exhibit G—Abstract entry 23).

By quitclaim deeds executed during January of 1919, all recorded on February 4, 1919, seven of the locators of the Elizabeth Nos. 9 through 12 conveyed

all of their interests in the claims to the eighth locator, E. E. Fordham (Exhibit G—Abstract entries 25 through 27).

By quitclaim deeds dated August 30, 1918, recorded January 14, 1919, and again by quitclaim deeds dated May 24 and 25, 1921, recorded June 23, 1922, E. E. Fordham and F. N. Juhan conveyed all of their interests in the Carbon Nos. 1 through 8 and Elizabeth Nos. 1 through 12 claims to H. C. Wolf (Exhibit G—Abstract entries 21, 22, 35, 36). This gave Wolf the entire record title interest in the 20 claims.

On December 26, 1919, H. C. Wolf filed for record a "Notice in Lieu of Annual Labor" with respect to the Carbon and Elizabeth claims, stating his intention to claim the benefits of a joint resolution of Congress suspending the requirement of annual assessment work on mining claims for the year 1919 (Exhibit G—Abstract 31).[25]

By a quitclaim deed dated December 18, 1920, recorded January 3, 1921, and again by a quitclaim deed dated May 31, 1921, recorded June 23, 1922, H. C. Wolf conveyed an undivided 81/100 interest in the Carbon and Elizabeth claims to L. Z. Harrison (Exhibit G—Abstract entries 32, 37).

On July 1, 1921, H. C. Wolf and L. Z. Harrison filed for record a "Notice of Intention to Hold Mining Claims" with respect to the Carbon and Elizabeth claims (Exhibit G—Abstract entry 33).

On July 1, 1921, Joe T. Juhan filed for record an "Affidavit of Labor and Improvements" with respect

[25] The Joint Congressional Resolution of 1919 (41 Stat. 354) providing for the suspension of the requirement of annual assessment work on mining claims is set forth in footnote 3, *supra*. Acts providing for the further suspension of assessment work on mining claims in years after 1919 are listed in footnote 4, *supra*.

to the Carbon and Elizabeth claims for the year ending December 31, 1920 (Exhibit G—Abstract entry 34).

By a quitclaim deed dated June 15, 1922, recorded June 23, 1922, L. Z. Harrison conveyed an undivided 1/3 interest in an undivided 81/100 interest in the Carbon and Elizabeth claims to Joseph Umpleby (Exhibit G—Abstract entry 38).

By a quitclaim deed dated June 16, 1922, recorded June 23, 1922, Joseph Umpleby conveyed an undivided 1/2 interest in an undivided 1/3 interest in an undivided 81/100 interest in the Carbon and Elizabeth claims to A. F. Keene (Exhibit G—Abstract entry 39).

On June 30, 1922, an "Affidavit of Labor" for the year ending July 1, 1922, pertaining to the Carbon and Elizabeth claims was filed for record. The affidavit stated that the required expenditures of at least $100.00 on each of the twenty claims had been made by or at the expense of H. C. Wolf and L. Z. Harrison (Exhibit G—Abstract entry 40).

On October 27, 1922, an affidavit of labor was filed for record stating that the required annual expenditures had been made on each of the twenty Carbon and Elizabeth claims. The expenditures, by or at the expense of H. C. Wolf, were allegedly made for the year ending December 31, 1920. This affidavit was stated to be a duplicate of a statement dated December 31, 1920, apparently never recorded (Exhibit G—Abstract entry 41).

By a quitclaim deed dated May 21, 1923, recorded May 26, 1923, L. Z. Harrison conveyed an undivided 27/100 interest in the Carbon and Elizabeth claims to Leon Levy and Sam Levy (Exhibit G—Abstract entry 42).

On July 5, 1923, an affidavit of labor for the year ending July 1, 1923 was filed for record stating that the required annual expenditures, by or at the expense of H. C. Wolf and L. Z. Harrison, had been made on each of the twenty Carbon and Elizabeth claims (Exhibit G—Abstract entry 43).

A similar affidavit of labor was filed for record on June 30, 1924. This affidavit stated in part, "Such expenditure made by or at the expense of H. C. Wolf, L. Z. Harrison and Dr. J. B. Umpleby of Oklahoma City, Oklahoma, and Leon Levy, Sam Levy and Amor F. Keene of New York City, being owners of said claims." (Exhibit G—Abstract entry 44).

On January 8, 1925 affidavits of labor pertaining to the period from July 1, 1924, to December 31, 1925 were filed for record, covering all of the Carbon and Elizabeth claims (Exhibit G—Abstract entries 45, 46).

On January 9, 1926, a Register's Final Certificate covering the Carbon Nos. 5 through 8 claims, which included all of Section 32, Township 4 South, Range 97 West, was issued to H. C. Wolf, L. Z. Harrison, Leon Levy, Sam Levy, Joseph B. Umpleby, and A. F. Keene (Exhibit G—Abstract entry 47).[26]

An affidavit of labor was filed for record on July 2, 1926, alleging that $100.00 worth of assessment work had been performed for the year 1925 on each of the Carbon Nos. 1 through 4 and the Elizabeth

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[26] A patent application was filed in 1925 seeking a patent to the Carbon Nos. 5, 6, 7 and 8. The Carbon Nos. 7 and 8 were patented on June 23, 1932. The Carbon No. 6 was declared null and void for lack of a valid discovery and the patent application was rejected as to the Carbon 5 inasmuch as it was not contiguous to the remaining claims covered by the patent application. The Carbon Nos. 5 and 6 are before the court in Civil Act 8156.

Nos. 1 through 12 claims (Exhibit G—Abstract entry 48).

A tax sale certificate was issued to Garfield County, Colorado on December 14, 1927, covering all of Section 32, Township 4 South, Range 97 West; these were the same lands covered by the Register's Final Certificate issued on January 9, 1926, the Carbon Nos. 5 through 8 claims (Exhibit G—Abstract entry 49).

On June 23, 1932, a mineral patent covering the Carbon Nos. 7 and 8 claims, which included the S½ of Section 32, Township 4 South, Range 97 west, was issued to H. C. Wolf, L. Z. Harrison, Leon Levy, Sam Levy, Joseph B. Umpleby and A. F. Keene (Exhibit G—Abstract entry 58). This patent was filed for record on June 7, 1937.

By a Treasurer's Deed dated and recorded March 29, 1940, Garfield County conveyed all of Section 32, Township 4 South, Range 97 West to R. F. Magor, Jr. for the sum of $500.00 "which sum covers the taxes, interest and costs and subsequent taxes on said property for the years 1927 to 1937 (Exhibit G—Abstract entry 59).[27]

Following the issuance of the Garfield County treasurer's deed, various conveyances were made through the years covering the S½ of Section 32, Township 4 South, Range 97 West, the lands covered by the mineral patent issued for the Carbon Nos. 7 and 8 claims (Exhibit G—Abstract entries 62 through 80).

By two quitclaim deeds acknowledged in California dated May 27, 1957, and filed for record on June 8, 1957, Mrs. B. M. Wolf, also known as Mrs. H. Comer

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[27] Apparently the mining claimants were not even sufficiently interested in the two claims that had been patented to redeem the lands from the county.

Wolf and Mrs. H. C. Wolf (allegedly the surviving spouse and only heir at law of H. C. Wolf) conveyed the Carbon Nos. 1 through 8 and Elizabeth Nos. 1 through 12 claims to Wasatch Development Company, a Colorado corporation (Exhibit G—Abstract entries 81 and 82).

At the time of this conveyance, and for the period from 1923 to 1957 the record title to the unpatented Carbon and Elizabeth claims was as follows: H. C. Wolf an undivided 19/100, L. Z. Harrison an undivided 27/100, J. P. Umpleby an undivided 13½/100, A. F. Keene an undivided 13½/100, Leon Levy and Sam Levy an undivided 27/100.

On July 19, 1957, Wasatch Development Company through its agent and attorney-in-fact, Edward N. Juhan, commenced publication of a Forfeiture Notice in the Grand Valley News, a small weekly newspaper published in the town of Grand Valley, Colorado (Exhibit G—Abstract entry 85). The forfeiture notice was directed to H. C. Wolf, L. Z. Harrison, Joseph Umpleby, A. F. Keene, Leon Levy, Sam Levy and all unknown persons claiming any interest in the Carbon and Elizabeth mining claims. It provided in part as follows:

> You are hereby notified that Wasatch Development Company, a Colorado corporation, has expended, during the fiscal year beginning July 1, 1956, and ending July 1, 1957, in excess of one hundred dollars in labor and improvements for the benefit of each of the following named mining claims. . . .
>
> You are further notified *that said expenditure for labor and improvements was made in order to hold said claims under the provisions of U.S.C. Title 30 Section 28* and any amendments hereto,

> concerning annual assessment work upon mining claims being the amount required to hold said placer mining claim for the period ending on the first day of July, 1957. . . . And you and each of you, are hereby further notified that if within ninety days after this notice by publication, you or any one of you fail or refuse to contribute your proportion of such expenditure as a co-owner in such claim or claims as each of you may now hold an interest, such interest, and each of your interests, in said claims shall be forfeited to and become the property of the subscriber hereof. . . . (underlining added)

On December 29, 1958, the District Court, Garfield County, Colorado, issued a decree on a petition of Wasatch Development Company for the determination of interests in property of H. C. Wolf. The court found that Wolf died intestate in October of 1951 at Sylacauga, Alabama, that his sole and only heir was Mrs. H. C. Wolf and that Wasatch Development Company was the owner of the Carbon Nos. 1 through 8 and Elizabeth Nos. 1 through 12 claims by conveyance from said heir (Exhibit G—Abstract entry 91).

On April 30, 1959, Edward N. Juhan filed for Wasatch Development Company an affidavit entitled "Proof of Non-Contribution" stating that with respect to the Carbon and Elizabeth claims "all persons named in the Forfeiture Notice (except Joseph Umpleby) wholly failed to comply with the demand contained in said notice." (Exhibit G—Abstract entry 97).

On May 1, 1959, the District Court, Garfield County, Colorado issued a quiet title decree determining that Wasatch Development Company was the owner of an undivided 86½/100 interest and Joseph

Umpleby the owner of an undivided 13½/100 interest in the unpatented Carbon and Elizabeth mining claims, being the Carbon Nos. 1 through 6 and the Elizabeth Nos. 1 through 12 (Exhibit G—Abstract entry 98).

No affidavits of assessment work or notices of intention to claim the benefits of suspension of assessment work requirements were filed with respect to the Carbon and Elizabeth claim between July of 1926 and December of 1957. No assessment work instruments were filed after December of 1957 and prior to the filing of the patent application covering the Carbon and Elizabeth claims on September 8, 1959. Thus the only assessment work instrument that was filed subsequent to July of 1926 was the one filed in connection with the forfeiture proceedings by which Wasatch Development Company gained control of all interests in the unpatented claims except the interest of Joseph Umpleby.

V. The Southwest, Northwest, Northeast and Southeast Claims.[25]

The Southwest, Northwest, Northeast and Southeast oil shale placer mining claims were allegedly located on July 2, 1918 (Exhibit D—Abstract entries 27 through 30).

The four claims covered all of Section 27, with the exception of the SE¼NW¼ and the NE¼SW¼, Township 7 South, Range 98 West. The alleged locators of the claims were B. T. Napier, Robert Eaton, J. L. Armstrong, Luther Armstrong, W. H. Farnum, Hiram W. Smith, Morgan McCann, and Mark Love.

The locators claimed the discovery of a valuable mineral within the limits of each of the four mining

[25] The Northwest, Northeast, and Southeast claims are involved in Civil Action 8691.

claims, and in effect asserted that the lands (560 acres) were valuable for mining purposes.

B. T. Napier one of the original locators, died on March 12, 1919, and by a decree of the Garfield County Court dated September 25, 1920, his undivided 1/8 interest in the claims passed to Carrie St. Clair Napier (1/2 of 1/8), B. T. Napier, Jr. (1/4 of 1/8), and Clair Napier (1/4 of 1/8) (Exhibit D—Abstract entry 48).

By a mining deed dated and recorded June 17, 1921, Hiram W. Smith, one of the original locators, conveyed his undivided 1/8 interest in the four claims to C. R. McCarthy for a recited consideration of $350.00 (Exhibit D—Abstract entry 33).

By a quitclaim deed dated May 6, 1922, but not recorded until February 14, 1950, B. T. Napier conveyed his undivided 1/4 interest in the real estate of his father, B. T. Napier, Sr., to Carrie St. Clair Napier, for a recited consideration of $300.00 (Exhibit D—Abstract entry 49).

By a quitclaim deed dated December 5, 1925, recorded December 23, 1925, J. L. Armstrong, one of the original locators, conveyed his undivided 1/8 interest in the four claims to Elenor Armstrong (Exhibit D—Abstract entry 40).

Robert Eaton, one of the original locators, died on February 10, 1937, and under his will, not probated until 1952, his undivided 1/8 interest in the four claims passed to Mary E. Peck and Margaret E. Jones as devisees and legatees under the will as drawn in 1909 (Exhibit D—Abstract entry 57).

Carrie St. Clair Napier died on November 18, 1950, and under her will her 3/32 interest in the four mining claims passed in equal proportions to B. T. Napier, Jr. and Clair Napier Catlin. The mining claims were not specifically mentioned in the will

although other real property was mentioned (Exhibit D—Abstract entry 50).[29]

By a quitclaim deed dated May 2, 1952, recorded January 27, 1953, Luther Armstrong, one of the original locators in 1918, conveyed his undivided 1/8 interest in the four claims to John W. Savage and Joan L. Savage for a consideration of $200.00 (Exhibit D—Abstract entry 52, Exhibit E—page 1).[30]

By a quitclaim deed dated March 3, 1953, recorded March 19, 1953, and acknowledged in Nevada, Elinor Armstrong (who had obtained her interest in 1925) conveyed her undivided 1/8 interest in the four claims to John W. Savage and Joan L. Savage for a consideration of $200.00 (Exhibit D—Abstract entry 53; Exhibit E—page 1).

By a quitclaim deed dated April 11, 1955, recorded April 27, 1955, W. H. Farnum, one of the original locators in 1918, conveyed his undivided 1/8 interest in the four claims to Maude B. Farnum (Exhibit D—Abstract entry 54).

By a quitclaim deed dated December 3, 1955, recorded January 7, 1956, John W. Savage conveyed his interests in the four claims to Grace A. Savage (Exhibit D—Abstract entry 56).

At this time record title to the four claims was as follows: Morgan McCann, an original locator (1/8); Mark Love, an original locator (1/8); Grace A. Savage (1/8); Maude B. Farnum (1/8); Joan L. Savage (1/8); C. R. McCarthy (1/8); Mary E. Peck (1/16); Margaret E. Jones (1/16); Clair Napier Catlin (5/64); and B. T. Napier, Jr. (3/64).

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[29] The abstract does not indicate that any inheritance tax receipts or releases were ever obtained with respect to the four mining claims.

[30] For the 27-year period between 1925 and 1952, no conveyances affecting the claims were made.

On July 15, 1955, Maude B. Farnum, B. T. Napier, Jr, Clair Napier Catlin and Frankie C. McCarthy (presumably an heir of C. R. McCarthy, but actually a stranger to the title) commenced publication of a Forfeiture Notice in the Grand Valley News, a small weekly newspaper published in the town of Grand Valley, Colorado (Exhibit D—Abstract entry 58). The publication stated that during the year ending June 30, 1955, more than $100.00 worth of assessment work or expenditures had been performed on each of the four claims, and that any co-owners of the claims who failed to contribute their proportion of the expenditures within 90 days would be forfeited out.

On July 5, 1956, an affidavit was filed to the effect that no co-owner named in the forfeiture notice, with the exception of Joan L. Savage, Grace A. Savage, Mary E. Ellis (Peck) and Margaret E. Jones had contributed to the assessment work that had allegedly been done for the year ending June 30, 1955 (Exhibit D—Abstract entry 58).

By a quitclaim deed dated April 9, 1957, recorded April 27, 1957, and acknowledged partially in Colorado and partially in California, Mary E. Ellis (Peck) and Margaret E. Jones conveyed their interests in the four claims to William H. Farnum, Jr. and John R. Farnum for a consideration of $500.00 (Exhibit D—Abstract entry 60; Exhibit E—page 1).

On December 4, 1957, a judgment and decree was entered by the District Court, Garfield County, Colorado determining the ownership of the four claims to be as follows: Maude B. Farnum, an undivided 3/16; Frankie C. McCarthy, an undivided 3/16 (McCarthy, presumably an heir of C. R. McCarthy, was still a stranger to the title); B. T. Napier, Jr., an undivided 3/32; Clair Napier Catlin, an undivided

3/32; William H. Farnum, Jr., an undivided 3/32; John R. Farnum, an undivided 3/32; Joan L. Savage, an undivided 1/8; and Grace A. Savage, an undivided 1/8. All of the parties, except the two Savages, divided the forfeited interests of the two original locators, Morgan McCann and Mark Love (Exhibit D—Abstract entry 62).[21]

By a quitclaim deed dated July 14, 1958, recorded July 17, 1958, Frankie C. McCarthy conveyed all his interest in the four claims to William H. Farnum, Jr. and John R. Farnum for a consideration of $950.00 (Exhibit D—Abstract entry 66; Exhibit E—page 1).

By a warranty deed dated October 17, 1958, recorded October 30, 1958, B. T. Napier, Jr. and Clair Napier Catlin conveyed to themselves their own 3/16 record title interest in the four claims (Exhibit D—Abstract entry 67).

Assessment work instruments with respect to the four claims were recorded on the following dates: October 24, 1919; December 14, 1920; July 3, 1922; July 10, 1923; July 2, 1924; July 9, 1925; July 9, 1926; July 19, 1927; June 7, 1928; July 13, 1929; June 25, 1930; July 25, 1949; June 30, 1955 (Exhibit D—Abstract entries 31, 32, 34, 35, 36, 38, 42 through 47, and 55).

VI. The Oyler Nos. 1 through 4.[22]

The Oyler Nos. 1 through 4 oil shale placer mining claims were allegedly located in September of 1916

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[21] Again the records of the Bureau of Land Management would have shown that the two remaining original locators had died sometime prior to 1930 and that their interests passed to various heirs throughout the country.

[22] All of the four claims in the Oyler group are involved in Civil Action 9202.

by Ida O. Herwick, J. L. Herwick, Guy Herwick, Oren Herwick, William Herwick, Jennie Herwick, Fred Herwick and James Doyle.

Between 1916 and 1919 three separate sets of location certificates were filed with respect to the four claims. The first or original set, recorded October 3, 1916, included a range-township description of the claims, but because the lands covered by the claims had not then been publicly surveyed, the location certificates also described the claims by metes and bounds. The claims were described as covering what would be the NE¼ of Section 10, the N½ and the N½SW¼ of Section 11, and the W½NW¼ of Section 12, Township 6 South, Range 95 West, when the lands were surveyed. (Exhibit B—Abstract entries 6 through 9.)

In the second set of location certificates, dated October 3, 1916, and recorded January 12, 1918, the claims were described only by metes and bounds (with the exception of the Oyler No. 1),[33] in terms identical to the metes-and-bounds description found in the first set of location certificates (Exhibit B—Abstract entries 13 through 16).

The third set of location certificates, each captioned "Amended Location Certificate" dated January 31, 1918 and recorded February 2, 1918, included a range-township description of the claims identical to the description in the first set of location certificates; the amended certificates also included a metes-and-bounds description of the claims, identical to the corresponding description in the original location certificates with respect to claim Nos. 1, 3 and 4, and

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[33] The location certificate describing the Oyler No. 1 also recited that "when the public survey shall have been made the same will be the NE¼ of Section 10, Township 6 South, Range 95 West, 6 P.M."

slightly different with respect to claim No. 2 (Exhibit B—Abstract entries 17 through 20).

A second "Amended Location Certificate" dated November 15, 1918, was filed with respect to Oyler No. 4 on November 16, 1918. By changing the metes-and-bounds description, this certificate was intended to significantly alter the position of claim No. 4 (Exhibit B—Abstract entry 22).

As originally located, each of the claims covered 1/4 of a section of land or 160 acres each. The claim allegedly covered the NE¼ of Section 10, the N½ and the N½SW¼ of Section 11, and the W½NW¼ of Section 12, in Township 6 South, Range 95 West. The locators claimed the discovery of a valuable mineral within the limits of each of the four mining claims, and in effect asserted that the lands (640 acres) were valuable for mining purposes.

By a mining deed dated November 9, 1917, and recorded December 3, 1917, before the date of filing of the second set of location certificates, seven of the original locators of the Oyler claims conveyed their interests to the eighth locator, J. L. Herwick (Exhibit B—Abstract entry 11).

By an instrument dated and recorded November 16, 1918, J. L. Herwick, the remaining original locator, agreed to quitclaim the Oyler Nos. 1 through 4 claims to M. W. Bausell, N. E. Beck, J. G. Paden, Ed A. O'Brien, E. T. Underwood and J. A. Wilson, under an escrow arrangement, for $4,000.00 and 5,000 shares of stock in the National Oil Shale Refining Company (Exhibit B—Abstract entry 21). This agreement was supplemented by a quitclaim deed dated November 15, 1918, recorded September 4, 1919, by which J. L. Herwick conveyed the Oyler Nos. 1 through 4 claims to the persons named in the agreement for a recited consideration of $4,500.00 (Exhibit B—Abstract entry 24).

By a quitclaim deed dated December 1, 1919, recorded November 9, 1920, M. W. Bausell, Monnie G. Bausell, N. E. Beck, Mrs. N. E. Beck, J. G. Paden, Josie Paden, Ed A. O'Brien, Mrs. Ed A. O'Brien, E. T. Underwood, Mrs. Ina Underwood, J. A. Wilson and Mrs. J. A. Wilson (Being the persons to whom J. L. Herwick had earlier quitclaimed the Oyler claims, and presumably the wife of each) conveyed the Oyler Nos. 1 through 4 claims to the Champion Oil Shale and Refining Company [34] (Exhibit B—Abstract entry 28). The deed of conveyance was acknowledged in New Mexico and Kansas.

By a mining deed dated November 27, 1920, recorded March 24, 1921, The Champion Oil Shale and Refining Company conveyed the Oyler Nos. 1 through 4 claims to the Index Shale Oil Company [35] (Exhibit B—Abstract entry 29).

Beginning in 1923, lands owned by the Index Shale Oil Company, including the Oyler Nos. 1 through 4 placer mining claims, became subject to a number of labor liens, mortgages, judgments, and decrees as a result of the financial indebtednesses of Index Shale Oil Company (Exhibit B—Abstract entries 30 through 43, 45). On July 30, 1928, in response to a complaint filed by Harry L. Brown, the District Court, Garfield County, Colorado, issued an order appointing a receiver for Index Shale Oil Company

[34] The incorporators of Champion Oil Shale and Refining Company, a New Mexico corporation, were N. W. Bausell, J. A. Wilson, J. G. Paden, Edw. A. O'Brien, N. E. Beck, E. T. Underwood, and D. R. Carrol. Each incorporator also owned an equal number of shares (Exhibit B—Abstract entry 61).

[35] The incorporators of Index Shale Oil Company, a Colorado corporation, were Chester W. Church, Courtland R. Jones, William R. Mack, and Edward B. Wheeler (Exhibit B—Abstract entry 60).

(Exhibit B—Abstract entry 47). This receiver was subsequently dismissed in a court action of November 19, 1934, and Harry L. Brown was left in charge of certain property involved in the receivership (Exhibit B—Abstract entry 62). Upon the later motion of Harry L. Brown, the cause of action against Index Shale Oil Company was dismissed (Exhibit B—Abstract entry 63).

By a quitclaim deed dated November 15, 1948, recorded February 11, 1949, Chester W. Church, J. W. Lawrence, J. L. Bickel, Wm. T. Mack and C. J. Pfusch, allegedly "the sole surviving directors of the Index Shale Oil Company, dissolved," conveyed the Oyler Nos. 1 through 4 claims to Harry L. Brown and Penelope Chase Brown [36] (Exhibit B—Abstract entry 56).

By a quitclaim deed dated December 9, 1948, recorded February 11, 1949, Harry L. Brown and Penelope Chase Brown conveyed the Oyler Nos. 1 through 4 claims to the Inland Shale Oil Company [37] (Exhibit B—Abstract entry 57).

By a quitclaim deed dated February 3, 1953, recorded February 11, 1953, the Inland Shale Oil Company conveyed the Oyler Nos. 1 through 4 claims to Harry L. Brown and Penelope Chase Brown (Exhibit B—Abstract entry 65).

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[36] There is no indication of when the Index Shale Oil Co. dissolved; however, the Articles of Incorporation dated October 20, 1920 stated that the corporation would have a term of existence of 20 years (Exhibit B—Abstract entry 60).

[37] The certificate of incorporation of the Inland Shale Oil Company, dated November 3, 1948 and recorded May 4, 1950, indicates that the three original incorporators were Courtland R. Jones, Harry L. Brown, and Penelope Chase Brown (Exhibit B—Abstract entry 59).

On August 6, 1952, Harry L. Brown, Penelope Chase Brown, and Delas D. Potter, later joined by Harriette M. Jones and Chester W. Church, entered into an agreement with Pacific Oil Company, recorded January 4, 1954, by which the Browns and Potter as their agent agreed to sell and Pacific Oil Company agreed to buy certain oil shale claims, including the Oyler Nos. 1 through 4 claims, if the Browns were successful in perfecting title and securing patent to the lands. The agreement provided that Pacific Oil Company would pay $50.00 per acre for such lands (Exhibit B—Abstract entry 68).

Harry L. Brown and Penelope Chase Brown instituted a quiet title action in the District Court, Garfield County, Colorado, on March 7, 1953, with respect to certain named lands, including the Oyler Nos. 1 through 4 placer mining claims (Exhibit B—Abstract entires 66, 67). On July 21, 1954, the Distract Court determined that Harry L. Brown and Penelope Chase Brown were the sole and exclusive owners of the mining claims involved in the action, including the Oyler Nos. 1 through 4 claims, as against all defendants named in the complaint (Exhibit B—Abstract entry 69).

By an agreement dated April 25, 1955 between the Browns, Pacific Oil Company and others, arrangements were made to convey the Oyler claims and other claims to Pacific Oil Company (Exhibit B—Supplemental Abstract pages 1 through 19). This agreement provided in part as follows:

> "7. Subject to the other provisions of this paragraph, in the event patent shall be denied to any of said placers, or portions thereof, Party of the Second Part shall reconvey, by Special Warranty Deed, to the Parties of the First Part Harry L. Brown and Penelope Chase Brown the placers,

or portions thereof, as to which patent shall have been denied, and thereupon be relieved from further obligation with reference to such placers, or portions thereof, as to which patent has been denied."

* * * *

"If, however, Party of the Second Part is of the opinion and so notifies the Parties of the First Part within Ninety (90) days after receipt of notice of such patent denial that patent was denied because of some defect which is capable of being cured and desires to attempt to cure such defect and to continue its efforts to secure such patent, then Party of the Second Part shall have the right to retain the title to such land as to which patent has been denied and shall, with reasonable diligence, take and prosecute such steps as to it seem proper to cure such defect and attempt to secure such patent."

By a quitclaim deed dated May 13, 1955, recorded May 19, 1955, Gertrude I. Potter transferred any interest which she could convey in the Oyler Nos. 1 through 4 claims to the Pacific Oil Company (Exhibit B—Abstract entry 71).[35]

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[35] Delos D. Potter died on November 30, 1954, and under the terms of his will his wife Gertrude I. Potter became executrix of his estate (Exhibit B—Supplemental Abstract—pages 21, 22). On March 8, 1952, Delos Potter had entered into an agreement with Harry L. Brown, Penelope Chase Brown, Harriette M. Jones, and Chester W. Church forming the Harry L. Brown syndicate to provide for the management of certain unpatented oil shale mining claims (Exhibit B—Supplemental Abstract—page 1). This agreement has been followed by an agreement between Harry L. Brown, Penelope Chase Brown, and Delos Potter, and Pacific Oil Company relating to the sale of certain oil shale mining claims to Pacific Oil Company if patents were granted for the claims (Exhibit B—Abstract

By a deed dated May 16, 1955, recorded May 19, 1955, Harry L. Brown and Penelope Chase Brown conveyed the Oyler Nos. 1 through 4 placer mining claims to the Pacific Oil Company, subject to the rights of the United States of America therein (Exhibit B—Abstract entry 72).

On September 23, 1955, Pacific Oil Company filed for record an amended location certificate pertaining to the Oyler No. 4 claim (Exhibit B—Abstract entry 73). This amended location certificate was intended to re-establish the position of Oyler No. 4 as it had been described in the two original location certificates and the first amended location certificate filed in reference to the claim (Exhibit B—Abstract entries 7, 16, 20). The alleged position of the claim had been changed by the metes-and-bounds description in the second amended location certificate filed on November 16, 1918 (Exhibit B—Abstract entry 22).

By a quitclaim deed dated September 26, 1956, recorded December 3, 1956, Mrs. H. A. Hansen, Mrs. Marie Woolmans, Warren Hansen, Dan Hansen, Harold Hansen, Rex Rankin, Ruth Rankin Kilbey, Beth Rankin Derryberry, Herman Vorbeck, and Robert L. Vorbeck conveyed any interests they might have in the Oyler Nos. 1 through 4 claims, as well as their interests in certain other named claims, to Pacific

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entry 68). These two agreements were superseded by a later agreement of April 25, 1955 between Harry L. Brown, Penelope Chase Brown, Gertrude I. Potter as Executrix of the Estate of Delos D. Potter, Harriette M. Jones, and Chester W. Church and Pacific Oil Company (Exhibit B—Supplemental Abstract—pages 1 through 19). It was in compliance with the terms of this agreement that Gertrude I. Potter, Harry L. Brown, and Penelope Chase Brown conveyed their interests in the Oyler Nos. 1 through 4 claims to Pacific Oil Company in May of 1955.

Oil Company (Exhibit B—Supplemental Abstract—pages 26 through 33).[39]

On June 24, 1958, Pacific Oil Company filed for record a set of amended placer location certificates pertaining to the Oyler Nos. 1 through 4 claims, dated June 17, 1958 (Exhibit B—Supplemental Abstract—pages 34 through 41). These amended certificates described the Oyler claims as being contiguous to the patented Sheridan placer claims, which are situated south of the Oylers.

On July 16, 1959, Pacific Oil Company filed for record another set of amended location certificates, dated June 22, 1959, certaining to the Oyler Nos. 1 through 4 claims (Exhibit B—Supplemental Abstract —pages 42 through 56). These amended certificates described the Oyler claims by means of the Official Plat of Mineral Survey No. 20819.[40]

By a Special Warranty Deed dated July 16, 1964, recorded August 10, 1964, Pacific Oil Company conveyed the Oyler Nos. 1 through 4 claims to Penelope Chase Brown (Exhibit B—Supplemental Abstract—pages 57 through 60).[41]

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[39] All of the grantors of this quitclaim deed were named as defendants in the July 21, 1954 degree of the District Court of Garfield County, Colorado, quieting title to Oyler Nos. 1 through 4 placer mining claims and other lands (Exhibit B—Abstract entry 69).

[40] These amended location certificates shifted the boundaries of the claims hundreds of feet to the south and to the east and added approximately 20 acres to the claims.

[41] This reconveyance was pursuant to the terms of the April 25, 1955 agreement between Pacific Oil Company and Harry L. Brown, Penelope Chase Brown, Gertrude I. Potter as Executrix of the Estate of Delos D. Potter, Harriette M. Jones, and Chester W. Church, (Exhibit B—Supplemental Abstract —pages 1 through 19).

[Footnote continued on page 102]

On December 18, 1964, a "Memorandum of Agreement" dated November 9, 1964 was filed for record, stating that on September 1, 1964, Penelope Chase Brown and The Oil Shale Corporation entered into a lease and option-to-purchase arrangement covering the Oyler Nos. 1 through 4 oil shale placer mining claims (Exhibit B—Supplemental Abstract—pages 61 through 63).[42]

Assessment work instruments were filed for the benefit of the Oyler Nos. 1 through 4 placer mining claims by various persons on the following dates: January 5, 1918; December 14, 1918; December 27, 1919, December 29, 1919; August 10, 1925; April 29, 1926; June 28, 1933; June 28, 1935; June 28, 1936; June 26, 1937; June 18, 1939; June 30, 1939; June 27, 1949 (Exhibit B—Abstract entries 12, 23, 25, 26, 44, 46, 50 through 55, and 58).

VII. Summary.

The 48 Bute claims covering 7,680 acres were allegedly located during the winter of 1919-1920 by a group of nine individuals who conveniently dropped and added names to keep the number of locators to eight on any one location certificate. A notice in lieu of annual assessment work seeking the benefits of a suspension of the requirements of assessment work

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[41] [Continued]

According to information found in the reconveyance deed, Harry L. Brown was deceased at the time of this reconveyance. By a decree of the County Court, Mesa County, Colorado, entered on December 4, 1959, Penelope Chase Brown was named the sole heir at law of Harry L. Brown.

[42] In other words, the Oil Shale Corporation purchased an interest in the litigation arising as a result of the rejection by the Land Office Manager on February 16, 1962 of the patent application filed by Pacific Oil Company.

by Congress was recorded in 1921. No instruments were filed for record concerning the Bute claims between 1921 and 1954. In fact, no one bothered to record notices in lieu of annual assessment work during periods of subsequent suspension by Congress, or to record estate proceedings involving the interests of deceased locators. In 1954 Tell Ertl searched out two parties who had allegedly located the claim some 34 years previously and acquired the record title to a 2/8 interest in the claims for $200.00. In 1955 Tell Ertl purportedly "for the purpose of compliance with the law with reference to unpatented mining claims" performed $100.00 worth of assessment work on each of the 48 Bute claims. Tell Ertl then proceeded to forfeit out the alleged co-owners of the claims through a notice published in the Grand Valley News and directed to each of the original group of nine locators, with the exception of the two who had quitclaimed their interests to Tell Ertl. At the time of this notice the original locators were either deceased or resided in various parts of the United States. On the basis of the acquisition of a 2/8 record title interest in the claims and the forfeiture proceedings Tell Ertl obtained the record title interest to the 48 Bute claims. In 1964 The Oil Shale Corporation acquired the record title to 16 of the Bute claims for a purchase price in installments of $1,536,000.00. The Oil Shale Corporation also entered into a lease and option arrangement with Tell Ertl covering the remaining 32 Bute claims and 62 other oil shale claims acquired by Tell Ertl through forfeiture proceedings for an annual rental of $148,000.00. The only instruments shown in the abstract of title from the time of the location of the claims some 45 years ago relating to annual assessment work are (1) the notice in lieu of labor recorded in 1921, and (2) the affidavit of an-

nual labor recorded in 1955 by Tell Ertl as the basis for the forfeiture proceedings. The 48 Bute claims that had lain stagnant from 1921 until 1954 when Tell Ertl searched out two original locators and acquired interests in the Bute claims for approximately 39 cents an acre appear to have had a value as unpatented mining claims of some $600.00 per acre in 1964.

The 18 Atlas claims covering 2,880 acres were allegedly located during the winter of 1919-1920 by a group of nine individuals who dropped and added names to keep the number of locators to eight on any one location certificate. Four of the original locators were also original locators of the Bute claims. The history of these claims is practically identical with the activity that took place with respect to the Bute claims. A notice in lieu of annual assessment work was recorded in 1921 with no other instruments being filed for record until 1954 when Tell Ertl obtained quitclaim deeds from two parties who had allegedly located the claims some 34 years previously. In 1955 and on the basis of his 2/8 record title interest Tell Ertl purportedly performed the annual assessment work for one year and then forfeited out the alleged co-owners of the claims through a notice in the Grand Valley News directed to seven of the original group of nine locators. In 1963 The Oil Shale Corporation entered into a lease and option arrangement with Tell Ertl covering the 18 Atlas claims, the 48 Bute claims and 44 other oil shale claims acquired by Tell Ertl through forfeiture proceedings. Again, the only instruments shown in the abstract of title from the time of the location of the claims some 45 years ago relating to annual assessment work are (1) a notice in lieu of labor recorded in 1921, and (2) the affidavit of annual labor re-

corded in 1955 by Tell Ertl as the basis for the forfeiture proceedings.

The 20 Camp Bird claims covering 3,200 acres were allegedly located during the winter of 1919-1920 by a group of eight individuals. Two of the original locators were also original locators of the Atlas claims and three of the original locators were also original locators of the Bute claims. The history of these claims is substantially the same as the activity that occurred with respect to the Bute claims and the Atlas claims with the exceptions (1) that the mining claimants did not bother to file a notice in lieu of annual assessment work in 1921, (2) that Tell Ertl searched out the alleged heirs of three original locators rather than the original locators themselves, and (3) that H. A. Dutton, Jr., who was apparently following a similar practice of reviving stagnant oil shale claims and who had also searched out the heirs of some of the original locators, answered Ertl's forfeiture notice and allegedly contributed his proportionate share of the annual assessment work for the one year. No instruments were filed for record concerning the Camp Bird claims between January of 1920 when the claims were located and November of 1955 when a quitclaim deed was obtained from an alleged heir of an original locator. No one bothered to record any estate proceedings involving the interests of the deceased locators, or to institute any actions to determine the interests of original locators until the late 1950s. In 1963 after Ertl had acquired Dutton's interest The Oil Shale Corporation entered into a lease and option arrangement with Tell Ertl covering the 20 Camp Bird claims and other oil shale claims acquired by Tell Ertl through forfeiture proceedings. The only instrument shown in the abstract of title from the time of the location of the Camp

Bird claims some 45 years ago relating to annual assessment work is the affidavit of annual labor recorded in 1956 by Tell Ertl as the basis for his forfeiture proceedings.

The eight Carbon claims and twelve Elizabeth claims were allegedly located during the spring of 1918 by members of the Juhan family, the Parnum family, the Ford family and others. Shortly after the claims were located they were conveyed to one of the original group of eight locaters. Undivided fractional interests were subsequently created in the claims, and as of 1923 the claims were held by H. C. Wolf, L. Z. Harrison, and Dr. J. P. Umpleby of Oklahoma City, Oklahoma, and Leon Levy, Sam Levy, and Amor F. Keene of New York City. These parties subsequently obtained a patent to two of the Carbon claims with the patented lands eventually being sold for taxes by Garfield County. With the exception of affidavits of annual assessment work that were recorded in 1923, 1924, 1925 and 1926, nothing appears of record concerning the unpatented Carbon and Elizabeth claims until 1957 when Wasatch Development Company apparently searched out Mrs. H. C. Wolf, allegedly the surviving spouse and only heir of H. C. Wolf, and obtained quitclaim deeds covering Wolf's 19/100 record title interest in the unpatented Carbon and Elizabeth claims. Almost immediately after obtaining this conveyance, Wasatch Development Company commenced the publication of a forfeiture notice in the Grand Valley News alleging that "said expenditure for labor and improvements was made in order to hold said claims under the provisions of U.S.C. Title 30, Section 28." In 1958 Wasatch Development Company obtained a determination of interests in the property of H. C. Wolf, who had died intestate in 1951 in Alabama. As a result

of the forfeiture proceedings, Wasatch Development Company forfeited out all parties except Joseph Umpleby, who contributed his proportion of the alleged assessment work. The only assessment work instrument that was filed with respect to the claims subsequent to July of 1926 was the one filed in 1957 as the basis for the forfeiture proceedings conducted by Wasatch Development Company.

The Northwest, Northeast and Southeast claims were allegedly located during the summor of 1918. Three transfers of the interests of original locators occurred between the time of the location of the claims and 1925. For the 27-year period between 1925 and 1952 no conveyances affecting the claims were made. In 1955 a forfeiture notice was published in the Grand Valley News stating that during the year ending June 30, 1955, the annual assessment work had been performed and that co-owners of the claims who failed to contribute their proportion of the expenditures would be forfeited out. As a result the record title interest of two original locators who had died sometime prior to 1930 were forfeited out. Assessment work instruments with respect to these claims were recorded in the following years: 1919, 1920, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1949 and 1955.

The four Oyler claims were allegedly located during the fall of 1916 by members of the Herwick family and James Doyle. Several conveyances of the claims were made and in 1920 the Index Shale Oil Company obtained the full record title interest in the claims. The Index Shale Oil Company went into receivership in 1928. No conveyances affecting the claims were made between 1920 and 1948. In 1948 the sole surviving directors of the Index Shale Oil Company, a dissolved corporation, conveyed the claims

to Harry L. and Penelope Chase Brown. Arrangements were subsequently made between the Browns and the Pacific Oil Company with respect to the patenting and subsequent purchase of the claims and others by the Pacific Oil Company. In 1955 the claims were conveyed by the Browns to the Pacific Oil Company. Apparently as a result of the Land Office Manager's decision of 1962 rejecting the patent application, the Pacific Oil Company reconveyed the claims to Penelope Chase Brown. In 1964, several months after the Department had issued its decision in the *Union Oil Company* case, The Oil Shale Corporation entered into a lease and option to purchase arrangement with Penelope Chase Brown. Assessment work instruments with respect to these claims were recorded in the following years: 1918, 1919, 1925, 1926, 1933, 1935, 1936, 1937, 1938, 1939 and 1949.

APPENDIX C

The Assessment Work Contest Proceedings

I. Contest 11757—Bute Nos. 1 through 48 claims.[1]

Contest 11757 (Exhibit I-1) was originally initiated in 1927. On May 4, 1928, the Commissioner, General Land Office, issued a letter-decision declaring the Bute Nos. 1 through 48 claims null and void for the reason that the named contestees had failed to answer charges alleging a failure to peform annual assessment work "for the years ending July 1, of 1921 to 1927, inclusive." The Commissioner found that notice of the charges had been served on five of the eight mining claimants and that the registered letters addressed to the other three mining claimants had been returned unclaimed. None of the mining claimants made any appearance in the proceedings in order to protect their interests in the claims.

New proceedings were initiated, after the promulgation of the Krushnic decision by the Supreme Court, by letters dated June 30, and July 22, 1930, from the Commissioner to the Register of the Denver Land Office.[2] Complaints dated August 2, August 7 and October 24, 1930, and one dated July 13, 1931, were addressed to those persons whom it was thought had interests in the Bute claims at the time. The August 7 complaint stated in part as follows:

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[1] The claims involved in Civil Action 8680 are Nos. 1 through 19, 21 through 28, and 30 through 48.

[2] As a part of the proceedings a "Notice of Forfeiture" was posted on each of the claims advising that as a result of the failure to perform assessment work the United States had entered and taken possession of the lands for its own use and purposes.

> "That annual assessment work to the value of $100.00 was not performed upon each or any one of the Bute Nos. 1 to 48, inclusive, oil shale placers for the year ending July 1, 1930, and that work has not been since resumed.
>
> "Answer, if filed, should be filed in duplicate and contain a request for hearing if you wish a hearing set in the case.
>
> "By reason of the default in said assessment work the United States has taken possession of the lands within the claims for its own uses and purposes."

The August 2 and 7 complaints were addressed to the following: Benton Canon, Ethel McGahen, Frank Jackson, Stephen Murphy, W. S. Furman, James Murphy, Charles Anderson, and J. C. Moore, or his heirs or devisees. The August 2 complaint stated in the heading that it involved the Bute Nos. 1 through 48 claims and described the 48 claims in a footnote. The charge of a continuing failure to do assessment work was limited, however, to the Bute Nos. 1 through 18 claims. The August 7 complaint was drafted to correct this error, its charge alleging a continuing failure to perform annual assessment work for the benefit of the Bute Nos. 1 through 48 oil shale claims.

In a letter dated October 21, 1930, addressed to the Acting Register of the Denver Land Office, the District Law Officer of the General Land Office stated that Benton Canon died December 29, 1927, leaving a will which was probated February 24, 1928, and that his heirs had been identified as his widow, Mrs. Evelyn Canon, and his two daughters, Eva and Helen Canon. The October 24, 1930, complaint was addressed to these heirs, the charge in the complaint

being identical with the one made in the August 7 complaint.

In a letter dated October 28, 1930, addressed to the Acting Register of the Denver Land Office, the District Law Officer stated that Eva T. Canon, one of the heirs of Benton Canon, was then receiving mail c/o the Free Public Library, Council Bluffs, Iowa, at which place a service of notice of contest should be attempted. There is, however, no evidence in the record that any attempt was made to serve Miss Canon at that address.

On January 15, 1931, the Register addressed a letter to the Commissioner stating that service of notice of contest had been made on each of the claimants and recommending that the Bute claims be declared null and void for the reason that the claimants had failed to deny the charges in the contest complaint.

By a letter-decision dated July 3, 1931, the Commissioner declared the Bute Nos. 1 through 48 claims null and void to the extent of the interests of the parties served. This letter-decision read in part as follows:

> "The failures of the parties served with notices to file answers denying the charge are taken as admissions by them of the truth thereof in view of which the Bute Nos. 1 to 48 inclusive, oil shale placers are declared null and void to the extent of their interests therein, and the United States has taken possession of the lands within the claims for its own uses and purposes."

In the same letter-decision the Commissioner told the Register that reports from the field had stated that J. C. Moore's heirs were his widow, Mrs. Harry Kelly and his minor daughter, Colleen Moore, and that Ethel McGahen's married name was Lawrence.

Following the Commissioner's instructions, the complaint dated July 13, 1931, was drafted and sent to the persons considered to be the remaining unserved claimants. By a letter dated September 30, 1931, the Register advised the Commissioner that the named contestees had been served and that they had not responded to the charges in the complaint. On the basis of his letter and the return receipts attached to it, the Commissioner issued a letter-decision dated November 3, 1931. This letter-decision reads in part as follows:

> "The failure of the contestees to file answers denying the charges are taken as admissions by them of the truth thereof, in view of which the Bute Nos. 1 to 48 inclusive, oil shale placers are declared null and void in their entirety and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed.
>
> "Advise the parties hereof by ordinary mail."[3]

Following is a list of the names of the persons who held record title to the Bute Nos. 1 through 48 claims at the time of Contest 11757[4] according to the ab-

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[3] In other words, Interior proceeded by separate decisions relating to separate interests in the claims. The first decision of July 3, 1931, declared the claims null and void as to the interests of the parties served and who defaulted. The second decision of November 3, 1931, declared the claims null and void as to the interests of the remaining parties who were felt at the time to have been properly served subsequent to the decision of July 3, 1931, and who defaulted.

[4] Charles (Charley) Anderson had an interest in the Bute Nos. 1-8, 10-17, 19-26, 28-35, 37-44 and 46-48 claims. Ethel McGahen (Lawrence) had an interest in the Bute Nos. 1-7, 9-16, 18-25, 27-34, 36-43 and 45-48 claims. W. S. Furman

stract of title submitted by the plaintiffs, as supplemented by information in the file for Contest 11757. Also shown are the addresses to which the complaints were mailed, the names of the persons who signed the post office return receipts for these registered letters, and the dates of receipt of such letters.

Claimant	Return receipt signed by—	Notice received
Mrs. Evelyn Canon, 406 Oak Avenue, Ithaca, New York	Mrs. Evelyn Canon	October 30, 1930
Helen Canon, 406 Oak Avenue, Ithaca, New York	Mrs. Benton Canon	October 30, 1930
Eva T. Canon, 406 Oak Avenue, Ithaca, New York	Mrs. Benton Canon	October 30, 1930
Charles (Charley) Anderson, Shiprock, New Mexico	Charles Anderson	On or before August 26, 1930
Ethel McGahen Lawrence, 1114 W. 4th St., San Pedro, California	Ethel McGahen Lawrence	July 18, 1931
Mrs. Harry Kelly, R.R. No. 4, Grand Junction, Colorado	Mrs. Harry Kelly	July 17, 1931
Colleen Moore, R.R. No. 4, Grand Junction, Colorado	Mrs. Harry Kelly	July 17, 1931
W. S. Furman, Burbank, California	G. H. Furman	August 13, 1930
James Murphy, Burbank, California	Mrs. James Murphy	August 14, 1930
Frank Jackson, c/o Stephen A. Post, 329 Ute Avenue, Grand Junction, Colorado	E. Elizondo	On or before August 26, 1930
Stephen A. Murphy, Burbank, California	Mrs. Murphy	August 14, 1930
Stephen A. Post, 329 Ute Ave., Grand Junction, Colorado	Not named as a contestee	

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had an interest in the Bute Nos. 1-5, 7-14, 16-23, 25-32, 34-41 and 43-48 claims. James Murphy had an interest in the Bute Nos. 1-4, 6-13, 15-22, 24-31, 33-40 and 42-48 claims. Frank Jackson had an interest in the Bute Nos. 1-3, 5-12, 14-21, 23-30, 32-39 and 41-48 claims. Stephen A. Murphy had an interest in the Bute Nos. 1, 2, 4-11, 13-20, 22-29, 31-38 and 40-47 claims. Stephen A. Post had an interest in the Bute Nos. 2-10, 12-19, 21-28, 30-37, 39-46 and 48 claims. The heirs of Benton Canon shared an interest in the Bute Nos. 1, 3-9, 11-18, 20-27, 29-36, 38-45, 47 and 48 claims. The heirs of J. C. Moore shared an interest in the Bute Nos. 1-6, 8-15, 17-24, 26-33, 35-42 and 44-48 claims.

Since Stephen A. Post was not named as a contestee he was not, of course, served with notice of Contest 11757. Of the remaining claimants the evidence of service of notice of contest does not meet the standards set forth in the Department of Interior decision *Union Oil Company of California, et al.*, 72 I.D. 313 (1965), which supplements the decision *Union Oil Company of California, et al.*, 71 I.D. 169 (1964), as to the following: W. S. Furman, James Murphy, Frank Jackson, Stephen A. Murphy, Eva Canon and Helen Canon. Accordingly, the Commissioner's decisions were effective as to Mrs. Evelyn Canon, Charles Anderson, Ethel McGahen Lawrence, Mrs. Harry Kelly, and Colleen Moore.[5]

There are no documents in the contest file to show that the mining claimants took any action whatsoever during the course of Contest 11757. Nor is there anything to show that the claimants' acquiescence in the declaration of invalidity of their claims was subsequently disavowed by any action on their part. They apparently did nothing to advise the Depart-

[5] The standards followed by the Interior Department in the supplemental Union Oil Company decision with respect to clearing the cloud of old mining claims plastered over the public domain should be compared with the standards adopted by Tell Ertl as a volunteer in performing assessment work and forfeiting out parties holding record title interests in old mining claims. Interior in the supplemental decision (and contrary to the conclusions reached as to service at the time of the old proceedings in the 1930s) concluded, for example, that service on a spouse and the posting of a Notice of Forfeiture on the lands was not effective to clear the public domain of stagnant mining claims. Tell Ertl, however, adopted a standard of publishing a Notice of Forfeiture in the Grand Valley News, a small weekly newspaper in the town of Grand Valley Colorado, naming the original locators, many of whom were deceased or lived in other parts of the country in order to clear the record title to stagnant mining claims.

ment of the Interior that they asserted any interest in the claims either prior to, during, or subsequent to the contest proceedings. They did not exercise their right to file, pursuant to Rule 85 of the Department's rules of practice then in effect, a motion for the exercise of the Secretary's supervisory power, either before or after the promulgation of the Supreme Court's *Ickes* decision or the Department's Shale Oil Company decision. Indeed the last entry on the Backing Sheet for Contest 11757 is dated November 3, 1931, and reads as follows: "R. locations null and void. Case Closed—O—B . . . posted November 10, 1931. . . ." Nor is there anything in the contest file to show, or from which it may be inferred that this contest was reopened or the decisions therein modified in any respect upon a motion initiating within the Department itself.

The contest docket page for Contest 11757 (Exhibit K) shows that the case was closed in 1931 and that no further action was taken with respect to the case until 1959 when the case file was received in the local land office of the Bureau of Land Management.

The appropriate tract book pages in the local land office in Denver, Colorado, do not contain any reference to the contest proceedings or the decisions declaring the claims null and void (Exhibit GG-2—Tract book pages 181, 183 through 186). The tract book pages in the Washington office of the Bureau of Land Management (Exhibit GG-2—Tract book pages 133, 135 through 138) refer to an entry under section 18 of Township 4 South, which reads as follows:

"Bute No's. 1 to 48 oil shale placer locations . . . null and void, case closed 'N' July 3, 1931

. . . closed as to remaining parties 'N' November 3, 1931"

There is nothing on the Washington tract books to indicate that the above entry was changed or revoked.

II. Contest 11759—Atlas Nos. 1 through 18 claims.[6]

Contest 11759 (Exhibit I-2) was originally initiated in 1927. On May 4, 1928, the Commissioner issued a letter-decision declaring the Atlas Nos. 1 through 18 claims null and void for the reason that the named contestees failed to answer charges alleging that annual assessment work "for the years ending July 1 of 1921 to 1927, inclusive, was not performed upon or for the benefit of the claims." The Commissioner found that notice of the charges had been served on three of the eight mining claimants and that the registered letters addressed to the other five mining claimants had been returned unclaimed. None of the mining claimants made any appearance in the proceedings in order to protect their interests in the claims.

New proceedings were, however, ordered after the promulgation of the *Krushnic* decision by the Supreme Court, and complaints dated July 13, 1931, and November 9, 1931 were addressed to the persons whom it was thought had an interest in the claims at that time.[7] The sole charge in the complaints dealt with the claimant's alleged continuing failure to perform annual assessment work. The complaints spelled out the results of failing to file an answer and advised the mining claimants that "by reason of the

[6] The claims involved in Civil Action 8680 are Nos. 1, 2, 3, 7, 9, 10, 12, 17 and 18.

[7] Again as a part of the proceedings a "Notice of Forfeiture" was posted on each of the claims by the United States.

default in said assessment work the United States has taken possession of the lands within the claims for its own uses and purposes." The complaints were sent by registered mail to the following: Ethel McGahen Lawrence, Albert C. Coleman, Mrs. L. I. (Iris Campbell) Robinson, Harry U. Longwell, Stephen A. Post, W. S. Furman, Marcedus Murphy Furman and Mrs. Stephen A. Post.

In a letter dated August 27, 1931, the Register of the Denver Land Office advised the Commissioner that evidence of service of notice of Contest 11759 had been received for seven of the eight parties named as contestees and that no answer had been filed. By a letter-decision dated October 8, 1931, the Acting Commissioner of the General Land Office declared the Atlas Nos. 1 through 18 claims null and void to the extent of the interests of the parties served. This decision reads in part as follows:

> "The failures of the contestees served with notices to file answers denying the charge were taken as admissions by them of the truth thereof, in view of which the Atlas Nos. 1 to 18, inclusive, oil shale placers are declared null and void to the extent of the interests of the parties served and the United States has taken possession of the lands within the claims for its uses and purposes. *The case is closed to the extent of the interests of the parties served.* (Underlining added.)
>
> "Advise the parties by ordinary mail."

By a letter dated October 8, 1931, the Acting Commissioner sent to the Register in Denver a copy of his decision of that date, and told him to ascertain the address of and serve with a notice of contest Mrs. Stephen A. Post, the only claimant then con-

sidered unserved. Thereafter, two attempts were made to serve Mrs. Post, once in November, 1931, and once in February, 1932, both of which failed.

Following is a list of the names of the persons who held, according to the abstract of title submitted by the plaintiffs, as supplemented by information in the file for Contest 11757, the record title to the Atlas claims during the time of Contest 11759.[8] Also shown are the addresses to which the contest complaints were sent by registered mail, the names of the persons who signed the post office return receipts for these registered letters, and the dates of receipt of such letters.

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[8] W. S. Furman had an interest in the Nos. 1, 3-10 and 12-18 claims. Marcedus Murphy had an interest in the Nos. 1, 2, 4-11 and 13-18 claims. Iris Campbell (Robinson) had an interest in the Nos. 1-3, 5-12 and 14-18 claims. Ethel McGahen (Lawrence) had an interest in the Nos. 1-4, 6-13, and 15-18 claims. W. H. Post had an interest in the Nos. 1-5, 7-14, and 16-18 claims as an heir of Emma J. Boyd. Stephen A. Post had an interest in the Nos. 1-18 claims either as a locator or as an heir of Emma J. Boyd. Albert C. Coleman had an interest in the Nos. 1-6, 8-15, 17 and 18 claims. Harry U. Longwell had an interest in the Nos. 1-7, 9-16, and 18 claims. The heirs of J. C. Moore, i.e., Mrs. Harry Kelly and Colleen Moore, his widow and daughter respectively, shared an interest in the Nos. 2-9 and 11-18 claims.

Claimant	Return receipt signed by—	Notice received
W. S. Furman, 639 South Spring St., Los Angeles, California	N. Youloff	July 18, 1931
Ethel McGahen Lawrence, 1114 W. 24th St., San Pedro, California	Ethel McGahen Lawrence	July 18, 1931
Albert C. Coleman, Oxford Hotel, Grand Junction, Colorado	Mrs. A. J. Smith	July 17, 1931
Harry U. Longwell, 218 Sunset Boulevard, Modesto, California	Harry U. Longwell	July 20, 1931
Stephen A. Post, 229 North First St., Grand Junction, Colorado	Stephen A. Post	July 17, 1931
W. H. Post	Not named as a contestee	
Marcedus Murphy, 144 South Cedar St., Glendale, California	Catherine Murphy	July 18, 1931
Mrs. Harry Kelly	Not named as a contestee	
Colleen Moore	Not named as a contestee	
Iris Campbell Robinson, 2358 E. 70th St., Chicago, Illinois	Iris C. Robinson	July 17, 1931

Those who were not named as contestees were not served with notice of Contest 11759. This includes W. H. Post, Mrs. Harry Kelly and Colleen Moore. In addition, the evidence of service of notice of contest on Albert C. Coleman, Marcedus Murphy and W. S. Furman does not meet the standards set forth in the 1965 *Union Oil Decision, supra.* Accordingly, the decision declaring the Atlas Nos. 1 through 18 oil shale claims null and void was effective only as to Ethel McGahen Lawrence, Harry U. Longwell, Stephen A. Post and Iris Campbell Robinson.

No service having been made on Mrs. Stephen A. Post, who at the time was considered to have an interest in the Atlas claims, Contest 11759 had not been completely closed on the books of the Denver Land Office when the Supreme Court issued the *Ickes* decision. By a letter dated August 16, 1935, addressed to the Commissioner from the Register, captioned "Transmitting Contest Record 11759. Dismissed and closed," Contest 11759 was completely closed on the records of the Denver Land Office and

the case file was transmitted to the Commissioner's Office in Washington, D. C. The letter states in part:

> "Your letter . . . of July 29, 1935 . . . instructed this office to close all cases of adverse proceedings against mineral locations or entries where the charge was failure to perform annual assessment work on the claims. Contest 11759 is closed on the records of this office under those instructions and the papers herewith transmitted. Claimants have not been advised of this action as they have not filed answer to the charges."

Since the Commissioner's letter-decision of October 8, 1931, had closed Contest 11759 to the extent of the seven persons considered to have been served with notice of contest, it is evident that this letter could have the effect only of closing the contest to the extent of the one person who remained, on the records of the Land Office, as an unserved claimant. If the word "dismissed," used in the caption of the transmittal letter, has any meaning at all, it must mean only that the contest was dismissed as to the one claimant remaining unserved. The Register could not, of course, reverse the action of his superior, the Commissioner of the General Land Office, and dismiss the contest as to seven parties whose interests were declared null and void by the October 8, 1931, letter-decision.[9]

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[9] The July 29, 1935, letter from the Commissioner (Exhibit 72) reads in part as follows:

> "Several contest cases involving oil shale placers are now pending in your office. In view of the decisions referred to hereinabove, you are instructed to close out on your records and transmit to this office all contest cases involving solely the question of a failure to perform annual assessment work. . . ."

[Footnote continued on page 121]

There are no documents in the contest file to show, or from which it may be inferred, that the claimants took any action during the course of Contest 11759 to assert their alleged rights in the mining claims. Nor is there anything to show that they later disavowed their acquiescence in the declaration of invalidity of the claims. They did nothing to advise the Department that they had, or wished to reinstate, claims to the land. Neither did they exercise their right, provided by Rule 85 of the Department's Rules of Practice then in effect, to petition for an exercise of supervisory authority by the Secretary of the Interior.

The Backing Sheet for Contest 11759 contains four entries. The first noting that adverse proceedings had been initiated; the second, dated October 8, 1931, reads as follows: "R.—Locations Null and Void—Case Closed—O—D . . . Posted . . . October 10, 1931 . . . ." The third entry, dated September 19, 1935, simply reads "to DN-CRB." The last entry is dated March 13, 1943. It reads "Insts. to Reg. C 1606652 —D . . . ." Thus, there is nothing to show on this Backing Sheet, or elsewhere in the record, that the contest was reopened or that the decision issued therein was modified in any respect after the promulgation of the Supreme Court's *Ickes* decision or the Department's *Shale Oil Company* decision.

The contest docket page for Contest 11759 (Exhibit K) shows that the claims were declared null and void as to the parties served in 1931, that the parties were so advised, and that the case was closed pursuant to the instructions of July 29, 1935 (Ex-

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[9] [Continued]

The subject contest was pending only as to the interest of the one unserved claimant and had previously been closed as to the interests of all other parties.

hibit 72). The contest docket page further shows that no subsequent action was taken with respect to the case until 1959 when the case file was received in the local office of the Bureau of Land Management.

The appropriate tract book pages in the Denver Land Office do not contain any reference to the contest proceedings or the decisions declaring the claims null and void (Exhibit GG-1—Tract book pages 133, 136 and 137). The tract book pages in the Washington Office of the Bureau of Land Management (Exhibit GG-3—tract book page 197)[10] refer to an entry under Section 15 of Township 4 South which reads as follows: "Atlas Nos. 1 to 18 oil shale placers (in Sections 10, 11, 12, 13, 14, and 15) null and void, case closed 'N' October 8, 1931." There is nothing on the Washington tract book to indicate that the above entry was changed or revoked.

III. Contest 11761—Camp Bird Nos. 1 through 20 claims.[11]

Contest 11761 (Exhibit I-3) was originally initiated in 1927. On May 4, 1928, the Commissioner, General Land Office, issued a letter-decision declaring the claims null and void on the basis of the named contestees' failure to answer a contest complaint charging that annual assessment work "for the years ending July 1 of 1921 to 1927, inclusive, was not performed upon or for the benefit of the claims. None of the mining claimants made any appearance in the

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[10] The Washington tract book pages covering the lands included in the Atlas claims were placed in Exhibit GG—3 relating to the Camp Bird claims, and the Washington tract book pages with respect to the Camp Bird claims were placed in Exhibit GG—1 relating to the Atlas claims.

[11] All of the Camp Bird claims are involved in Civil Action 8680.

proceedings in order to protect their interests in the claims.

In a letter dated June 30, 1930, the Commissioner directed the Register to initiate new proceedings based on a charge of a continuing failure to perform annual assessment work for the year ending July 1, 1929. A complaint dated August 4, 1930, was addressed to the following persons, whom, it was thought, were the co-owners of the claims: "Leroy C. Albright, or his heirs or devisees; John E. Lowe, or his heirs or devisees. J. E. Billings, Charles W. Reed, Stephen A. Post, Charles Anderson." In a letter, dated March 10, 1931, to the Commissioner, O. J. Berry, of the General Land Office, stated that notices of contest had been served on several of the locators, but he suggested that new charges be preferred because the claims were posted with a Notice of Forfeiture for the assessment year ending July 1, 1930. In a letter dated July 6, 1931, the Commissioner directed the Register to serve notice on the suggested charges only on those parties who were not served with the August 4, 1930, complaint. Thereafter, a complaint dated July 14, 1931, charging, in essence, a continuing failure to perform assessment for the year ending July 1, 1930, was drafted with the following named as contestees: "Leroy C. Albright, J. E. Billings, Charles W. Reed, Charles Anderson, Stephen A. Post, J. C. Moore, dec'd., heirs: Mrs. Harry Kelly and Colleen Moore, (minor), John E. Lowe, Emma J. Boyd, dec'd, heir: Mrs. S. A. Post."

In a letter dated August 27, 1931, the Register advised the Commissioner that evidence of service of notice had been received on seven of the contestees, that the notice sent to Mrs. S. A. Post had been returned unclaimed, and that notice had not been sent

to John E. Lowe, whose address was unknown. In a letter-decision dated October 20, 1931, the Acting Commissioner declared the Camp Bird Nos. 1 through 20 claims null and void to the extent of the interests of the seven contestees thought to have been properly served with notice of contest. He stated:

> "The failures of contestees served with notices to file answers denying the charges were taken as admissions by them of the truth thereof, in view of which the Camp Bird Nos. 1 to 20, inclusive, oil shale placers are declared null and void to the extent of the interests of the parties served and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed to the extent of the interests of the parties served.
> "Advise the parties by ordinary mail."

Following is a list of the names of the persons who held record title to the Camp Bird Nos. 1 through 20 claims at the time of Contest 11761, according to the abstract of title submitted by the plaintiffs, as supplemented by information in the file for Contest 11761. Also shown are the addresses to which the complaints were mailed, the names of the persons who signed the post office return receipts for these registered letters, and the date of receipt of such letters.[12]

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[12] W. H. Post held an interest as an heir in Emma J. Boyd, an original locator who died intestate on September 29, 1921. It was not until 1959 that anyone bothered to determine the interest of Emma J. Boyd's heirs in the Camp Bird and other oil shale claims (Exhibit 259—Abstract entry 150).

Stephen A. Post held an interest as an original locator and as an heir of Emma J. Boyd.

Mrs. Harry Kelly and Colleen Moore held an interest as the widow and daughter of an original locator, J. C. Moore. Ap-

Claimant	Return receipt signed by—	Notice received
W. H. Post	Not named as a contestee	
Stephen A. Post, 229 North First St., Grand Junction, Colorado	Stephen A. Post	July 17, 1931
Leroy C. Albright, 958 Ouray Ave., Grand Junction, Colorado	Blanche Waters	August 9, 1930
J. E. Billings, 433 North 7th Ave., Grand Junction, Colorado	E. Elizondo	On or before August 25, 1930
Charles W. Reed, 611 Ouray Ave., Grand Junction, Colorado	E. Elizondo	On or before August 25, 1930
Charles Anderson, Shiprock, New Mexico	Charles Anderson	On or before August 26, 1930
Mrs. Harry Kelly, R.R. 4, Grand Junction, Colorado	Mrs. Harry Kelly	July 17, 1931
Colleen Moore, R.R. 4, Grand Junction, Colorado	Mrs. Harry Kelly	July 17, 1931
John E. Lowe	No letter sent because address unknown	

Although the Commissioner's decision of October 20, 1931, declared the claims to be null and void to the extent of seven of the nine named contestees, there is in the record proper proof of service of notice of contest only for Stephen A. Post and Charles Anderson, who were served with a copy of the August 4, 1930, complaint, and Colleen Moore and Mrs. Harry Kelly, who were served with copies of the July 14, 1931, complaint. Proof of service on the other named claimants does not meet the standards set forth in the decision *Union Oil Company of California et al., supra.* Thus the Commissioner's decision did not affect the interests of W. H. Post, who was not named as a contestee, John E. Lowe, whose address was unknown, Leroy C. Albright, J. E. Billings and Charles W. Reed.

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parently no proceedings were ever held to determine the interest of J. C. Moore's heirs in the Camp Bird and other oil shale claims.

Since John E. Lowe and Mrs. Stephen A. Post, who were named as contestees, remained unserved, Contest 11761 had not been completely closed on the books of the Denver Land Office when the *Ickes* decision was issued.

By a letter dated August 16, 1935, to the Commissioner from the Register, captioned "Transmitting Contest Record 11761. Dismissed and closed," Contest 11761 was closed on the records of the Denver Land Office and the case file was transmitted to the Commissioner's Office in Washington, D. C. The letter states:

> "Your letter . . . of July 29, 1935, . . . instructed this office to close all cases of adverse proceedings against mineral location or entries where the charge was failure to perform annual assessment work on the claims. Contest 11761 is closed on the records of this office under those instructions and the papers herewith transmitted.
>
> "Claimants have not been advised of this action as they have not filed answer to the charges."

As the Commissioner's letter-decision of October 20, 1931, closed Contest 11761 to the extent of seven of the nine named contestees, it is evident that the Register's August 6 letter could have the effect only of closing this contest to the extent of the two people who remained on the records of the land office as unserved claimants. And, if the word "dismissed," used in the caption of the transmittal letter, has any significant meaning at all, it must mean only that the contest was dismissed as to the two claimants who were then considered to be unserved claimants. The Register could not, of course, reverse the action of the Commissioner and dismiss the contest as to

those parties whose interests were closed out by the Commissioner's October 20, 1931, letter-decision.[13]

There is nothing in the file to show that the claimants took any action during the course of Contest 11761 to assert their alleged rights in the Camp Bird mining claims. Nor is there anything to show that they later disavowed their acquiescence in the declaration of invalidity of the claims. They did nothing to advise the Department that they had, or wished to reinstate, claims to the land. Although the Commissioner's decision was final, they could have exercised their right, provided by Rule 85 of the Department's Rules of Practice then in effect, to petition for an exercise of supervisory authority by the Secretary of the Interior. They did not, however, avail themselves of this right.

The Backing Sheet for Contest 11761 contains four entries. The first, dated July 6, 1931, merely notes the adverse proceedings. The second dated October 20, 1931, states "R. Locations null and void. Case closed—O—D—. . . Posted . . . October 26, 1931. . . ." The third entry dated March 13, 1943, stated "Reg. Insts. to, C166652—D . . ." Thus, there is nothing to show on this Backing Sheet, or elsewhere in the record, that the contest was reopened or that the decision issued therein was modified in any respect after the promulgation of the Supreme Court's *Ickes* decision or the Department's *Shale Oil Company* decision.

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[13] As noted in Footnote 9 in connection with the Atlas claims the July 29, 1935, letter from the Commissioner (Exhibit 72) dealt only with pending contests, and the subject contest was pending only as to the interests of the remaining unserved claimants. The contest had previously been closed as to the interests of all other parties by the Commissioner's letter-decision of October 20, 1931.

The contest docket page for Contest 11761 (Exhibit K) shows that the claims were declared null and void as to the parties served in 1931, that the parties were so advised, and that the case was closed pursuant to the instructions of July 29, 1935 (Exhibit 72). The contest docket page further shows that no subsequent action was taken with respect to the case until 1959 when the case file was received in the local office of the Bureau of Land Management.

The appropriate tract book pages in the Denver Land Office do not contain any reference to the contest proceedings or the decisions declaring the claims null and void (Exhibit GG-3—tract book pages 133, 134, 135, and 138). The tract book pages in the Washington Office of the Bureau of Land Management (Exhibit GG-1—tract book page 198)[14] refer to an entry under Section 17 of Township 4 South, which reads as follows: "Camp Bird Nos. 1 to 20 oil shale placers (in Sections 2, 3, 4, 9, 16 and 17) null and void, case closed 'N' October 20, 1931." There is nothing on the Washington tract book to indicate that the above entry was changed or revoked.

IV. Contest 12029—Carbon Nos. 1 through 4 and Elizabeth J. Nos. 1 through 12 claims.[15]

Contest 12029 (Exhibit F) was originally initiated by a complaint dated June 26, 1929. The complaint alleged that annual assessment work had not been performed for the years ending July 1, 1927, and July 1, 1928. The contestees named in the complaint

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[14] The Washington tract book pages covering the lands included in the Camp Bird claims were placed in Exhibited GG—1 relating to the Atlas claims.

[15] Civil Action 8685 involves the Carbon Nos. 1 through 5 and the Elizabeth J. Nos. 1, 2, and 4 through 12 claims.

were Genevieve Juhan, Glenwood Springs, Colorado, L. Z. Harrison, 160 Broadway, New York, New York, Amos F. Keene, 106 E. 85th Street, New York, New York, Leon Levy, 475 Fifth Avenue, New York, New York, Joseph B. Umpleby, Norman, Oklahoma, Winifred Robinson, 2204 Adams Ave., Scranton, Pennsylvania. An answer was filed July 30, 1929, by Malcolm Lindsay, an attorney for L. Z. Harrison, Amos F. Keene, Leon Levy and Joseph B. Umpleby, named as contestees, and Sam Levy, 475 Fifth Ave., New York, New York, and H. C. Wolf (no address given), who were not named as contestees, but who were alleged to be co-owners of the claims. The claimants admitted no assessment work was done as charged, but alleged that the United States could not contest the claims on this ground.

On July 31, 1929, the District Law Officer for the General Land Office filed a motion for judgment by confession on the basis of the claimants admission of the truthfulness of the charge in the contest complaint. In a response to the motion, filed August 1, 1929, the claimants requested suspension of the contest until a decision was rendered in the case of *Wilbur* v. *Krushnic*, then pending before the Supreme Court. By a letter dated September 24, 1929, the case was transmitted to the Commissioner for his consideration of the motion for judgment by confession.

In a letter dated June 4, 1930, the Commissioner told the Register to amend the charge in contest 12029 to allege a continuing failure to perform annual assessment work for the year ending July 1, 1929, and a taking of the lands by the United States for its own uses and purposes by reason of the default in assessment work, and to serve notice of the new charge on the claimants. A complaint dated

June 9, 1930, was addressed to the same persons as the one drafted in 1929. The abstracts of title in the patent application files of the plaintiffs show, however, that at the time of contest the record title to the Carbon Nos. 1 through 4 and Elizabeth Nos. 1 through 12 claims was in the six persons who answered the 1929 contest complaint, i.e., Wolf, Harrison, Umpleby, Keene and the two Levys. On July 8, 1930, those persons answered the complaint, admitting the charge therein, but alleging that the United States could not contest the claims on this ground.

In letter-decision dated July 23, 1930, the Commissioner overruled the contentions in the claimants' answer. This decision reads in part as follows:

> "The fact that the claims were valid existent claims at the date of the leasing act, and that the claims have not been abandoned, does not excuse the claimants from maintaining the claims by the performance of annual assessment work.
>
> "The contentions of the contestees are overruled.
>
> "While it may be inferred from the statement in the answer that work was not resumed, after the default in the assessment work for the year ending July 1, 1929, and prior to time notice of the challenge on behalf of the United States was served on the contestees, nevertheless contestees will be allowed 30 days from notice in which to file answers denying such to be the case, if in accordance with the facts, or to appeal to the Secretary of the Interior; in default of action by the contestees, within the time allowed, the truth of the charge will be taken as admitted, and the claims will be declared null and void, without further notice."

On August 28, 1930, the claimants filed an appeal to the Secretary of the Interior in which they again alleged, in essence, that the United States could not challenge a mining claim on the basis of a failure to perform annual assessment work and alleged that the Commissioner erred in not granting them a hearing. By a letter dated September 18, 1930, the claimants requested that a decision in the contest be deferred until after a decision had been rendered in the case of *United States* v. *Federal Shale Oil Company* (Exhibit X). This request was granted, and, in a decision dated November 29, 1930, the Assistant Secretary affirmed the Commissioner's July 23, 1930 decision on the basis of the decision in the *Federal Shale Oil Company*. The Secretary's decision was transmitted to the contestees' attorneys by a letter dated December 8, 1930, signed by the Assistant Secretary of the Interior. This letter reads as follows:

> "Enclosed find copy of Department decision in above-entitled case. See Rule 83, Rules of Practice, as amended October 25, 1915."

It is significant that the letter calls the contestees' attention to Rule 83 of the Rules of Practice. Rule 83 provided:

> "Motions for rehearing before the Secretary must be filed within 30 days after receipt of notice of the decision complained of and will act as a supersedeas of the decision until otherwise directed by the Secretary. Such motions, briefs, and arguments must not be served on the opposite party and must be filed directly with the Secretary of the Interior, Washington, D.C."

There is nothing in the record to show, however, that a motion for rehearing was filed either before or after the Supreme Court's *Ickes* decision, and the Department's *Shale Oil Company* decision.

In a letter dated August 6, 1931, the Register advised the Commissioner that the claimants had failed to file an answer denying the charges in the June 9, 1930, complaint within 30 days after their attorney had been served with a copy of the Assistant Secretary's November 29, 1930, decision. He recommended that the contested claims be declared null and void pursuant to the self-executing invalidation provisions of the Commissioner's July 23, 1930, decision. Accordingly, in a letter-decision dated August 25, 1931, the Commissioner declared the Carbon Nos. 1 through 4 and the Elizabeth J. Nos. 1 through 12 claims null and void and closed the case. This letter reads in part as follows:

> "The failures of the contestees to file answers denying the charge are taken as admissions by them of the truth thereof, in view of which the Carbon Nos. 1 to 4, inclusive, and Elizabeth J. Nos. 1 to 12, inclusive, oil shale placers, are declared null and void in their entirety and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed.
>
> "Advise the parties thereof by ordinary mail."

There is nothing in the record of Contest 12029 to show that the claimants thereafter made any effort to assert any rights to the lands embraced by the Carbon and Elizabeth J. claims. They did not file a motion for rehearing under Rule 83. They did not otherwise ask for a reconsideration of their case, nor did they file a motion for an exercise of the super-

visory authority of the Secretary, as was their right, pursuant to Rule 85.

It should be emphasized that there is nothing in the record to show that the Department on its own motion took any action to modify the invalidation decisions previously issued. It appears that the case file remained in the Department's archives until October of 1959, when it was removed and sent to the Department's State Supervisor for Colorado pursuant to his request. The last entry on the Backing Sheet for the contest is dated October 25, 1931. It reads "R. Locations null and void. O-D . . . Posted . . . September 1, 1931. . . ."

The contest docket page for Contest 12029 (Exhibit K) shows that the claims were declared null and void in their entirety in 1931 and that no further action was taken with respect to the case until 1959 when the case file was received in the local office of the Bureau of Land Management.

The appropriate tract book pages in the local and office in Denver do not contain any reference to the contest proceedings or the decisions declaring the claims null and void (Exhibit FF—tract book pages 239, 240). The tract book pages in the Washington Office of the Bureau of Land Management (Exhibit FF—tract book page 84) refer to an entry under Section 36, Township 4 South, which reads as follows:

> "Carbon Nos. 1, 2, 3, 4 and Elizabeth J. Nos. 1 to 12 oil shale placer locations (in Section 33, 34, 35, and 36) null and void, case closed 'N', August 25, 1931."

There is some indication that a line may have been drawn through the above entry. Such action would not, however, be consistent with the failure to take any action on similar entries in the tract books re-

lating to hundreds of other oil shale placer mining claims (see, for example, the tract book pages covering the lands in the other claims involved in Civil Action 8680 and the numerous tract book pages in Exhibit RR).

V. Contest 12972—Northwest, Northeast, Southeast and Southwest claims.[16]

Contest 12972 (Exhibit C) was initiated after the issuance of the Supreme Court's *Krushnic* decision. A complaint dated August 3, 1931, charged that there had been a continuing failure on the part of the claimants to perform annual assessment work for the year ending July 1, 1931.

The complaint was addressed to B. T. Napier, deceased, heirs: Mrs. B. T. Napier, Miss St. Clair Napier, and B. T. Napier, Jr., all of Glenwood Springs, Colorado; C. R. McCarthy, and W. H. Farnum, also of Glenwood Springs, Colorado, Elenor Armstrong, Luther A. Armstrong and Robert Eaton, all of DeBeque, Colorado; Morgan McCann, deceased heirs: Mrs. Josephing McCann Leahy and Miss Lena McCann, at St. Anthony's Home, DeBeque, Colorado; H. D. Locke, administrator of the estate of Morgan McCann, DeBeque, Colorado; and Mark Love, deceased, heir: Mrs. Joe Love, Buena Vista, Colorado. A complaint dated August 13, 1931, with a similar charge, was addressed to J. A. McCann, North William Street, Dayton Ohio, and Frank McCann, Pittsburg, Kansas.

The abstract of title submitted by the Plaintiffs as a part of their patent application shows that the record title to the claims was in all of the contestees

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[16] All but the Southwest claim are involved in Civil Action 8691.

except Barnette T. Napier, Jr., who had conveyed his interest in the claims to his mother on May 6, 1922.

Of the named contestees, Mrs. B. T. (Carrie St. Clair) Napier, St. Clair Napier, W. H. Farnum and C. R. McCarthy filed an answer to the complaint. In addition, there are in the record post office return receipts signed by Robert Eaton, J. A. McCann, and "Jo" (Mrs. Joe) Love, which are adequate proof of service of notice of the contest. In addition, in a letter dated August 16, 1931, J. A. McCann acknowledged receipt of the complaint, denying, however, that he had any knowledge of, or interest in, any oil shale claims. There is, on the other hand, no proper proof of service of notice of contest on Luther Armstrong, Mrs. Josephine McCann Leahy, Miss Lena McCann, Frank McCann and Elinor Armstrong, none of whom signed a post office return receipt, filed an answer to the complaint, or otherwise acknowledged receipt of a contest complaint.[17]

In their answer filed September 21, 1931, the Napiers, McCarthy and Farnum, through their attorney, W. F. Noonan, denied assessment work was not

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[17] While the Commissioner found that all parties in interest had been properly served and, as will be subsequently noted, declared the Northwest, Northeast, and Southeast claims null and void in their entirely. The Interior Department in a decision dated December 13, 1965, supplementing the *Union Oil Company of California* decision, *supra* (A-29560, Supp. B) concluded as follows:

> "The return receipts for the registered letters addressed to Luther Armstrong, Mrs. Josephine McCann Leahy, Miss Lena McCann, Frank McCann and Elinor Armstrong were however, signed by persons other than the addressees, and there is nothing in the record to show that the person signing had been authorized by the addressees to receive such letters. Hence, the receipts do not constitute proper proof of service of notice of contest on these claimants."

performed for the benefit of the Southwest claim, and alleged generally that a failure to perform annual assessment work was not a proper basis for contest by the United States.

By a letter dated September 9, 1931, the answering claimants were notified to appear and offer evidence on October 21, 1931, before a Notary Public in Glenwood Springs, Colorado, the letter also stating that the final hearing would be held on November 12, 1931, before the Register of the Denver Land Office. The October 21 hearings consisted of reading a stipulation into the record. The stipulation described the assessment work done for the Southwest claim, admitted the truth of the assessment work charge as to the remaining claims, and stated in part as follows:

> "That it is further agreed that the case may be submitted to the Commissioner of the General Land Office for adjudication upon this stipulation of facts, together with the legal questions raised by way of plea to jurisdiction and demurrer in the answer filed by the answering defendants in this cause."

In a letter-decision dated December 23, 1931, the Commissioner declared the Northwest, Northeast and Southeast claims null and void on the basis of the admitted failure to perform annual assessment work. The decision states:

> "The validity of the Northwest, Northeast and Southeast placers having been challenged by the government after failure to perform the annual labor for the year ending July 1, 1931, and before work was resumed thereon, the said claims are declared to be null and void subject to answering contestees' right of appeal within 30 days from notice.

"It appearing that work to the value of $100.00 was performed upon the Southwest oil shale placer for the year ending July 1, 1931, the contest as to that claim is dismissed and the case as to it is closed.

"Advise the answering contestees hereof and that in the absence of appeal within the time allowed, the Northwest, Northeast and Southeast placers will be declared null and void and the case closed without further notice."

On February 3, 1932, the Register transmitted return receipts to the Commissioner as proof of service of the Commissioner's letter-decision of December 23, 1931, on the contestees, stating that no appeal had been filed. By a letter-decision dated February 23, 1932, the Acting Commissioner declared the claims null and void and closed the case. This decision reads as follows:

"Referring to the case, the claimant's name and serial number of which appear above, the decision of this office, date of which is noted in the caption hereof, has become final because of the failure of the parties in interest to appeal therefrom.

"You will note on your records that the case is hereby closed, and transmit copy of this letter to the parties in interest by ordinary mail.

"Your report in this case by letter of February 3, 1932, shows service was made upon the parties by registered mail on December 31, 1931.

"The Northeast, Southeast and Northwest oil shale placers in Sec.27, T.7S., R.98W., 6th P.M. are declared null and void. The United States has taken possession of the lands within the

> claims for its own uses and purposes, and the case is closed."

There is no evidence in the file for Contest 12972 to indicate in any way that the claimants made any effort to disavow their acquiescence in the Commissioner's decision of December 23, 1931. No attempts were made, as far as the record shows, to reinstate the entries through the filing of a motion for an exercise of the Secretary's supervisory authority pursuant to Rule 85 of the Department's Rules of Practice. Nor is there any evidence in the record upon which it may be inferred that the Department, on its own motion, vacated or otherwise modified the action previously taken.

The contest docket page for Contest 12972 (Exhibit K) shows that the case was closed in 1932 with the claims being declared null and void and that no further action was taken with respect to the case until 1959 when the case file was received in the local land office of the Bureau of Land Management.

The appropriate tract book pages in the local land office in Denver do not contain any reference to the contest proceedings or the decision declaring the claims null and void (Exhibit EE—tract book page 33). The tract book pages in the Washington Office of the Bureau of Land Management (Exhibit EE —tract book page 57) contain the following notation:

> "Northwest, Southeast and Northeast oil shale placers null and void, case closed 'N' February 23, 1932."

There is nothing on the Washington tract books to indicate that the above entry was changed or revoked.

VI. Contest 12039—The Oyler Nos. 1 through 4 claims.

In a letter dated July 16, 1925, addressed to the Secretary of the Interior, the Acting Secretary of the Navy commented on the possible existence within the Naval Oil Shale Reserves Nos. 1 and 3 in Colorado and No. 2 in Utah of some unpatented oil shale claims. He requested the Secretary of the Interior to undertake an investigation of this matter with a view to having the Naval Oil Shale Reserves definitely established as to their limits and area. Subsequently dated documents in file for Contest 12039 (Exhibit A) show that the Secretary acted upon the request made by the Department of the Navy, and an investigation of the oil shale claims within these Reserves was undertaken. Among the claims investigated were the Oyler Nos. 1 through 4 claims. As a result of these investigations adverse proceedings were initiated by a complaint dated June 28, 1929, which charged that the $100.00 worth of assessment work had not been done on each of the claims since the date of the Mineral Leasing Act, and that reported amendments of the claims were invalid to the extent they embraced lands not included in the claims as originally located.[18] An answer denying the

[18] The mineral examiner in his report of February 28, 1929, noted that:

> "In examining the records of the Sheridan Placer Claims, I find that there are 21 of these which were located September 25, 1916, the same date as the Oyler claims were located, thus making a total of 25 claims located on unsurveyed ground in one day. This appears to me to be a rather far fetched proceeding to claim that 25 160-acre tracts could be surveyed, discoveries made and location notices posted in one day in particularly rough country, with precipitous cliffs and side hills."

However, no charge was made as to the validity of the original locations.

charges and alleging that any default in the performance of assessment work "would not be available to the United States" was filed by the Index Shale Oil Company through C. J. Pfusch as Receiver.

In a letter dated November 12, 1930, the Acting Commissioner advised the Chief of Field Service, Denver, Colorado, that the charge in the 1929 complaint was "ineffective" in view of the Supreme Court's *Krushnic* decision and told him to take appropriate action. A letter from the Chief of Field Division to the Register, dated July 20, 1931, directed the drafting of a new complaint which was to charge the claimant with a continuing failure to perform adequate assessment work for the year ending July 1, 1931. A complaint containing such a charge, dated July 22, 1931, was addressed to "The Index Shale Oil Co., Directors: W. T. Mack, C. W. Church, J. W. Lawrence, J. L. Bickel, C. J. Pfusch, C. J. Pfusch, Receiver." On August 14, 1931, the record shows that W. T. Mack's address was 622 Denham Building, Denver, Colorado; C. W. Church's 622 Denham Building, Denver, Colorado; J. W. Lawrence's Point Pleasant, New Jersey; J. L. Bickel's 423 1st Street, Westfield, N.J.; and C. J. Pfusch's 163 Marine St., Ocean Park, California.[19]

On August 14, 1931, an answer was filed by H. L. Brown as agent for Index denying the charge of de-

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[19] In explaining why other charges were not brought against the claims, the Acting Secretary of the Interior by a letter dated August 8, 1931, advised the Secretary of the Navy as follows:

> "If this charge [default in assessment work] is not denied by the claimants, or, if after answer is filed, the charge is proven at a hearing, the claims will be declared null and void, and there will be no necessity for attacking the claims on other ground."

fault in assessment work and alleging that any such default "is not available to and could not be taken advantage of by the United States." By a letter dated September 1, 1931, the Commissioner advised the Register as follows:

> "This case falls within the instructions contained in office letter 'N' of August 17, 1931 (1383406) approved by the Secretary of the Interior, that where answers raising issues of fact are filed, which also contain pleas to the jurisdiction of this Department, the pleas will be considered when the hearing records are adjudicated, in view of which the answer is herewith returned and you will proceed in the matter so that hearing may be had."

On September 25, 1931, H. L. Brown as agent and C. J. Pfusch as receiver for Index, and Penelope Chase Brown, Watson Current, Inglis M. Uppercu and Schuyler C. Schieffelia, the alleged trustees, if any, of said Index Shale Oil Company, waived service of process and notice and adopted the answer filed by H. L. Brown.

A hearing was held October 8, 1931, William F. Noonan appearing on behalf of the contestees. The parties entered into a stipulation which provided, among other things, that no assessment work was done as charged in the contest complaint.

By a letter-decision dated December 2, 1931, the Commissioner declared the claims null and void. Portions of this letter-decision read as follows:

> "The record has now been examined and it appears that certain portions of the claims, as now described, are invalid because they were not embraced in the claims as originally located, but

were included therein by amendment subsequent to the date of passage of the leasing act of February 25, 1920 (41 Stat. 457). The land added by amendment having been withdrawn by executive order for inclusion in the Naval Oil Shale withdrawal, and by act of Congress (the Leasing Act, supra) was not subject to location, and its attempted inclusion through amendment of the original locations was without effect. As to such portions, therefore, the claims are held to be null and void."

* * * *

"It is admitted that a challenge by the United States to the valid existence of the Oyler claims was made while the owners thereof were in default in the performance of the annual labor for the year ending July 1, 1931, and before work was resumed. The right of the Government to make such a challenge is clearly recognized by the Supreme Court.

"The Oyler claims Nos. 1, 2, 3, and 4, are, therefore, held to be null and void.

"Advise contestees hereof, and that in the absence of an appeal from this decision to the Secretary of the Interior within 30 days from notice said decision will become final without further notice."

On January 9, 1932, the attorney for the claimants filed an appeal to the Secretary of the Interior from the Commissioner's decision. The appeal alleged in part that the Department of the Interior was without jurisdiction to declare claims null and void for failure to perform assessment work. By a decision dated March 10, 1932, the Assistant Secretary affirmed the Commissioner's decision and held the

claims to be null and void for the reasons stated in the *Federal Shale Company* case (Exhibit X). By a letter dated March 14, 1932, signed by the Assistant Secretary of the Interior a copy of the Department's March 10 decision was transmitted to the attorneys for the claimants. The last sentence of this letter reads, "See Rule 83, Rules of Practice, as amended October 25, 1915." Although the claimants' attention was specifically directed to Rule 83, which provides for the filing of a motion for rehearing within 30 days, there is nothing in the record to show that the claimants availed themselves of this opportunity. Thus, on April 21, 1932, the Assistant Secretary transmitted the case file to the Commissioner of the General Land Office, stating that the Department's decision had become final. Subsequently, in a letter-decision dated April 27, 1932, the Commissioner addressed the following comments to the Register:

> "Referring to the case, the claimant's name and serial number of which appear above, you are advised that the decision of the Department, the date of which is noted in the caption hereof, has become final. A copy of said decision is inclosed for your information and files, and one for the contestee company.
>
> "You will note on your records that the case is hereby closed.
>
> "The Oyler Nos. 1 to 4, inclusive, oil shale placers are declared to be null and void and the United States has taken possession of the lands within the claims for its own uses and purposes."

The file of Contest 12039 contains a copy of a letter prepared for the Acting Secretary of the Interior to the Secretary of the Navy, dated October

31, 1935. This letter written after the *Ickes* decision refers to a letter of Secretary Ickes dated November 1, 1933, that contained a list of oil shale placer claims, including the Oyler claims. The letter discusses the assessment work contests, stating specifically:

> "All previous action taken upon such charges in the cases referred to [in the November 1, 1933 letter] therefore is without effect and void. The status of the claims so far as this Department is concerned is that they are subsisting claims. . . ." [20]

The record does not contain any evidence that the claimants attempted to have the Secretary exercise his supervisory authority to re-establish the validity of the claims on the records of the Department after the promulgation of the *Ickes* decision. It appears that the records of Contest 12039 remained in the Department's archives until shortly after November 20, 1957, since there is in the file a memorandum of that date, to the Director, Bureau of Land Management, from the State Supervisor, Colorado, request-

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[20] There is no indication that this letter was released to the public or that anyone, and in particular the mining claimants, took any action or relied in any way upon the conclusions expressed in the letter. In fact, Pacific Oil Company, the patent applicant, stated in its appeal before the Department of the Interior as follows:

> "Pacific Oil Company's first knowledge of the old contest proceedings was obtained through and not until the Manager's Decision of February 16, 1962. As has recently come to light, the file in the old Contest Proceedings involving the Oyler claims and the files in a number of other similar Contest Proceedings involving other placer claims, for most of the 29 years referred to in the Manager's Decision, have been buried in the Archives in Arlington, Virginia." (page 42)

ing that the case file be sent to Colorado for review in connection with the adjudication of the patent application (Colorado 012327) pertaining to the Oyler claims. A memorandum dated January 27, 1958, to the Director from the State Supervisor transmits the contest file to Washington in order that it might be returned to the archives at Alexandria, Virginia.

It should be emphasized that there is nothing in the record to show that the decisions declaring the Oyler claims to be null and void for a failure to do assessment work were at any time modified or vacated either at the request of persons claiming to have an interest in these oil shale claims, or as a result of action instituted on motion of the Department.

The contest docket page for Contest 12039 (Exhibit K) shows that the claims were declared null and void in 1932 and that no further action was taken with respect to the case until the 1950s when the case file was sent to the local office of the Bureau of Land Management.

The appropriate tract book pages in the local land office do not contain any reference to the contest proceedings or the decision declaring the claims null and void (Exhibit DD—tract book page 16).[21] The

[21] Historically a mining claimant has had no obligation to notify the land office of the location of a mining claim. The records of the land office would normally be noted only in the event the mining claimant filed an application for a mineral patent. Presumably the tract book records in the local land office were not noted with entries showing the decisions declaring oil shale claims null and void inasmuch as there was no corresponding entry showing the existence of the mining claims. The reason for noting the tract book records in the Washington office is not known. However, the contest docket books maintained by the local land office did contain, as shown

tract book pages in the Washington Office of the Bureau of Land Management (Exhibit DD—tract book page 220) contain the following notation:

> "Oyler Nos. 1, 2, 3 and 4 oil shale placers (in Sections 10, 11, 12) null and void, case closed 'N' April 27, 1932."

There is nothing on the Washington tract books to indicate that the above entry was changed or revoked.

VII. Summary

The 48 Bute claims were declared null and void to the extent of the interests of the mining claimants who were served and who failed to enter any appearance in the proceedings by a decision dated July 3, 1931. The claims were declared null and void as to the remaining interests by a decision dated November 3, 1931, as a result of a failure of the parties to enter any appearance in the proceedings. While the Commissioner of the General Land Office was of the opinion that proper service had been obtained on all of the mining claimants, a question does exist in view of the recent standards adopted by the Interior Department in the supplemental Union Oil Company decisions as to the extent of a portion of the interests that may not have been affected by the 1931 decision as a result of improper service.[22] There is

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by the contest docket pages, information concerning the contest proceedings.

[22] If the 1931 decisions are determined to be effective, then the Interior Department can determine the extent to which they might be ineffective for failure to obtain personal jurisdiction over some of the parties as was done in the *Union Oil Company* decisions in connections with patent applications. As yet, a patent application has not been filed covering the 46 Bute claims in Civil Action 8680.

nothing to indicate that any of the mining claimants asserted any interest in any of the Bute claims at any time during or subsequent to the contest proceedings until the late 1950s when Tell Ertl searched out alleged holders of fractional interests and forfeited out the alleged holders of the remaining interests. Nor is there anything to indicate that the 1931 decisions were specifically modified, vacated or changed in any way by the Interior Department.

The 18 Atlas claims were declared null and void to the extent of the interests of the mining claimants who were served and who failed to enter any appearance in the proceedings by a decision dated October 8, 1931. The contest proceeding was still pending as to one party believed by the General Land Office to have an interest in the claim when the *Ickes* decision was rendered. Pursuant to a letter of July 29, 1935, relating to pending cases, the contest was closed as to the interest of the one remaining party who had not been served. Again, a question exists in view of the recent standards adopted in the supplemental *Union Oil Company* decisions as to the extent of the interests that may not have been affected by the 1931 decision as a result of improper service.[23] There is nothing to indicate that any of the mining claimants asserted any interest in any of the Atlas claims at any time during or subsequent to the contest proceedings until the 1950s when Tell Ertl searched out alleged holders of fractional interests and forfeited out the alleged holders of the remaining interests. Nor is there anything to indicate that the 1931 decision declaring the claims null and void as to the interests of the parties served was specifically modified,

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[23] As yet, a patent application has not been filed covering the 9 Atlas claims in Civil Action 8680.

vacated or changed in any way by the Interior Department.

The 20 Camp Bird claims were declared null and void to the extent of the interests of the mining claimants who were served and who failed to enter any appearance in the proceedings by a decision dated October 20, 1931. The contest proceedings had not been completely closed and was still pending as to two parties believed by the General Land Office to have an interest in the claims when the *Ickes* decision was rendered. Pursuant to the letter of July 29, 1935, relating to pending cases, the contest was closed as to the interest of the two remaining parties who had not been served. Again, the recent standards adopted in the supplemental *Union Oil Company* decisions raise a question as to the extent of a portion of the interests that may not have been affected by the 1931 decision as a result of improper service.[24] There is nothing to indicate that any of the mining claimants asserted any interest in any of the Camp Bird claims at any time during or subsequent to the contest proceedings until the 1950s when Tell Ertl searched out alleged holders of fractional interests and forfeited out the alleged holders of the remaining interests. Nor is there anything to indicate that the 1931 decision declaring the claims null and void as to the interests of the parties served was specifically modified, vacated or changed in any way by the Interior Department.

The mining claimants entered an appearance in the contest proceedings involving the 4 Carbon and 12 Elizabeth claims and specifically questioned the authority for the Interior Department to declare the

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[24] As yet, a patent application has not been filed covering the 20 Camp Bird claims in Civil Action 8680.

claims null and void on the assessment work charge. The mining claimants appealed to the Secretary from an adverse decision of the Commissioner of the General Land Office. The Secretary in a decision dated December 8, 1930, concluded that there was a proper basis to declare the claims null and void for failure to perform the annual assessment work in view of the provision in Section 37 of the Mineral Leasing Act that claims must be "maintained" in compliance with the laws. Upon the mining claimants subsequent failure to specifically answer the charge in the contest complaint, the claims were declared null and void by a decision of the Commissioner dated August 25, 1931. There is nothing to indicate that any of the mining claimants asserted any interest in any of the Carbon and Elizabeth claims at any time subsequent to the contest proceedings until the 1950s when Wasatch Development Company searched out the alleged holder of a fractional interest and forfeited out (with the exception of Umpleby) the alleged holders of the remaining interests. Nor is there anything to indicate that the 1931 decision declaring the claims null and void was specifically modified, vacated or changed in any way by the Interior Department.

In the contest proceedings involving the Northwest, Northeast and Southwest claims some of the mining claimants failed to enter any appearance in the proceedings, and some appealed and specifically questioned the authority for the Interior Department to declare the claims null and void on the assessment work charge. Following a hearing the Commissioner by a decision dated December 23, 1931, declared the claims null and void on the basis of the admitted failure to perform the annual assessment work subject, however, to the right of appeal to the Secretary.

The parties were specifically notified of their appeal rights, and when the appeal period expired the Commissioner by a decision of February 23, 1932, declared the claims null and void and closed the case. In connection with the patent application file for these claims the Department of the Interior has concluded in a supplemental *Union Oil Company* decision that the Commissioner was in error in holding that proper service was obtained on five of the parties named who did not appear in the proceedings. There is nothing to indicate other than a notice in lieu of annual assessment work recorded in 1949 that any of the mining claimants asserted any interest in any of the claims subsequent to the contest proceedings until forfeiture proceedings were commenced in the 1950s. There is nothing to indicate that the 1932 decision declaring the claims null and void was specifically modified, vacated or changed in any way by the Interior Department.

The mining claimants entered an appearance in the contest proceedings involving the four Oyler claims and specifically questioned the authority for the Interior Department to declare the claims null and void on the assessment work charge. Following a hearing the Commissioner by a decision dated December 2, 1931, declared the claims null and void on the basis of the admitted failure to perform the annual assessment work subject, however, to the right of appeal to the Secretary. An appeal was taken and the Secretary in a decision dated March 10, 1932, concluded that there was a proper basis to declare the claims null and void under the Department's construction of Section 37 of the Mineral Leasing Act and affirmed the Commissioner's decision declaring the claims null and void. Upon the mining claimant's failure to file a motion for rehearing the case

was closed on April 27, 1932. There is nothing to indicate, other than the recordation of notices in lieu of annual assessment work, that the defunct corporation which held the record title to the claims asserted any interest in the claims subsequent to the contest proceedings until the Bureau of Mines began experimental operations under the Synthetic Liquid Fuels Act and constructed certain facilities on the lands embraced within the claims. There is some indication that some within the Interior Department were of the opinion that the 1932 decision declaring the claims null and void was without effect. However, there is nothing to indicate that the 1932 decision was specifically modified, vacated or changed in any way by the Interior Department.

APPENDIX D

History of the Specific Lands Embraced By The Oil Shale Claims in Question

I. The Bute Nos. 1 through 19, 21 through 28, and 30 through 48.

These claims were located in December of 1919 and January of 1920, and cover all of the lands in Sections 7 through 18, inclusive, Township 4 South, Range 96 West, with the exception of the SW¼ of Section 10 and the NE¼ of Section 16 covered by the Bute Nos. 20 and 29. The history of these lands is shown by Exhibit GG—2. This exhibit contains copies of (1) the tract book pages previously maintained in the Denver land office containing entries relating to the subject lands, (2) the plat book pages maintained in the Denver land office relating to the subject lands, (3) the tract book pages maintained in the Washington office of the Bureau of Land Management containing entries relating to the subject lands, (4) the plat book pages maintained in the Washington office of the Bureau of Land Management relating to the subject lands, (5) the pages from the recently installed records of the Denver land office covering all actions that have occurred with respect to the subject lands, (6) the serial register pages from the serial register books of the Denver Land office containing entries in abstract form with respect to certain types of action that have taken place with respect to the subject land, and (7) a diagram showing the lands covered by the subject claims.

Chronologically the history of the action that has taken place with respect to these lands as shown by the records of the Bureau of Land Management is as follows.

In 1916 the entire township was classified as mineral lands valuable as a source of petroleum and nitrogen by reason of the prospective value of the oil shale believed to underlie the lands (Exhibit N).

At the time the Bute claims were located the land was vacant, unappropriated public domain with the exception of 240 acres in parts of Sections 10 and 11 which were included in a homestead entry that had been filed in April of 1919 (GS 016439). The lands in this entry were subsequently patented under the homestead laws in 1927 with a reservation to the United States of the oil shale under the Act of July 17, 1914, 38 Stat. 509 *et seq.*, 30 U.S.C. 121, *et seq.*[1]

On July 12, 1920, a homestead entry (GS 019445) was allowed covering lands in portions of Sections 16 and 17. Patent was subsequently issued in 1922 covering 160 acres with a reservation to the United States of the oil shale under the Act of July 17, 1914, *supra.*[2]

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[1] Compare the decision of the Supreme Court in *Bunker Hill and Sullivan Mining and Concentrating Co.* v. *United States* (1913), 226 U.S. 548, and the decision of the Interior Department in *Sullivan et al.* v. *Tendolle* (1921) 48 L.D. 337, with the decision of the Interior Department in *James W. Bell* (1927), 52 L.D. 197, with respect to the availability of lands for mineral location covered by a valid and subsiding homestead entry.

[2] There is nothing to indicate that the mining claimants protested, contested or took any action as of the time the homestead entries were made, during the time that the necessary homestead improvements were being completed, or during the time that notice of intention to submit final proof under the homestead laws was published in the Grand Valley News. Apparently the mining claimants were unaware of the activity of the homestead entrymen or were not sufficiently interested to assert a paramount right to the surface of the lands by reason of the mining claims.

On June 22, 1921, two homestead entries (GS 019030 and GS 019031) were allowed covering lands in portions of Sections 14 and 15 and other lands not within the limits of the subject claims. Patents were subsequently issued in 1922 covering 240 acres in one homestead (of which 80 acres conflicted with the subject claims) and 320 acres in the other homestead, all of which conflicted with the Bute claims.[3] Again, there was a reservation of the oil shale believed to underlie the lands to the United States.

During 1920 and 1921 applications were filed for five other agricultural entries covering lands within the area of the Bute claims (GS 109446, GS 019448, GS 019604, GS 021356 and GS 021357). These entries were either withdrawn or cancelled between 1922 and 1928.[4]

During 1927 five applications were filed for oil and gas prospecting permits under the Mineral Leasing Act of February 25, 1920. The applications and resulting permits (D-038961, D-038962, D-038963, D-038979 and D-038958) covered practically all of the lands within the Bute claims. Prospecting permits were issued by the land office on the five applications during 1927 and 1928. Three of the permits (D-038961, D-038958 and D-038979) remained in existence until 1940 when they were cancelled. The other two permits (D-038962 and D-038963) remained in existence until December of 1938 when they were exchanged for oil and gas leases. The oil

[3] Again, the mining claimants were either unaware of the activity of the homesteaders or were not interested in asserting a prior right to the surface of the lands.

[4] In two of the entries, however (GS 019446 and GS 019448) a notice was published in the Grand Valley News in 1922, but again the mining claimants made no attempt to protest or contest the entries.

and gas leases were subsequently relinquished during the early 1940s.[5]

On April 15, 1930, by Executive Order No. 5327 the entire township was withdrawn under the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), from lease or other disposal and reserved for the purpose of investigation, examination and classification (Exhibit Q).

On April 3, 1931, the Act of February 28, 1931 (46 Stat. 1484) was construed to permit stock-raising homestead applications to be made for lands covered by the Executive withdrawal of April 15, 1930 (Exhibit Q).

By Executive Order of February 6, 1933, the oil shale withdrawal of April 15, 1930, was modified to permit the issuance of oil and gas permits and leases under the Mineral Leasing Act of February 25, 1920 (Exhibit Q).

On May 13, 1935, the oil shale withdrawal of April 15, 1930, was further modified to permit the issuance of sodium permits and leases under the Mineral Leasing Act of February 25, 1920 (Exhibit Q).

The entire township was withdrawn on July 23, 1934, from settlement, location, sale or entry and reserved for classification and pending determination of the most useful purpose such land could be put to under the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269) (Exhibit R). This action was subsequently cancelled on March 28, 1939.

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[5] Again, there is nothing in the records of the Bureau of Land Management to indicate that any protest, contest or any other action was taken by the mining claimants in connection with the issuance of prospecting permits and leases covering most of the lands included within the subject mining claims.

On September 19, 1934, the entire township was temporarily withdrawn from disposal of any kind subject to any and all existing valid rights until the matter of the permanent restoration to the Ute Indians as authorized by Section 3 of the Act of June 28, 1934 (48 Stat. 964) could be given appropriate consideration (Exhibit P). This withdrawal was revoked on December 8, 1938, pursuant to Section 6 of the Act of June 28, 1938 (52 Stat. 1209) which prohibited the restoration of certain lands in the State of Colorado to tribal ownership under the provisions of the Act of June 18, 1934 (Exhibit P).

Shortly after the passage of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269) the lands within the Bute claims were placed in a Grazing District. Grazing permits and/or licenses have been issued under the Taylor Grazing Act covering the lands within the Bute claims over the past 30-year period (Exhibit KK).

During 1951 seven applications for oil and gas leases under the Mineral Leasing Act of February 25, 1920, were filed with oil and gas leases subsequently being issued (C 02412, C 03018, C 03021, C 03189, C 03190, C 03476 and C 03191). These oil and gas leases covered most of the lands included in the Bute claims. Most of the leases were subsequently relinquished or terminated. However, some 1800 acres within the Bute claims are still covered by oil and gas leasees issued in 1951 (C 03191 A, C 03190 B, and C 03189 A).*

During 1952 and 1954 three applications for oil and gas leases were filed on lands covered by the Bute

* When partial assignments of a lease are made the lease is segregated into separate leases with the assigned portion carrying an alphabetical designation after the original serial number.

claims (C 05102, C 09578 and C 09568). Two of these leases have expired, the third has been segregated into two leases which cover a total of 320 acres and which are still in existence (C 09568 and C 09568 A).

In 1959 two applications were filed for oil and gas leases covering some 3095 acres within the Bute claims (C 033235 and C 033831). Leases were issued on the applications and the leases are still in existence.

Since 1960 eight applications have been filed for oil and gas leases covering the lands within the Bute claims (C 061538, C 079899, C 099828, C010556, C0105847, C 0116125, C 0124239 and C 0125679). On three of these applications (C 079899, C 0124239 and C 0125679) leases were issued. One of these leases (C 079899) subsequently terminated and the other two leases are still in existence. They cover a total of 720 acres within the area covered by the Bute claims. The five remaining applications for oil and gas leases are presently pending in the land office with no action having been taken to issue oil and gas leases. The leases if issued will cover approximately 1200 acres within the area covered by the Bute claims.

II. The Atlas Nos. 1, 2, 3, 7, 9, 10, 12, 17, 18.

These claims were located to cover the NW¼ of Section 10, SW¼ of Section 12, the W½ of Section 13, and the E½ and SW¼ of Section 14, and the S½ of Section 15 in Township 4 South, Range 95 West. They cover about 1,440 acres including 80 acres that were not subject to mining location when the claims were allegedly located. The history of these lands is shown by Exhibit GG—1. This exhibit contains copies of (1) the tract book pages previous-

ly maintained in the Denver land office containing entries relating to the subject lands, (2) the plat book pages maintained in the Denver land office relating to the subject lands, (3) the tract book pages maintained in the Washington office of the Bureau of Land Management containing entries relating to the subject lands.[1] (4) the plat book pages maintained in the Washington office of the Bureau of Land Management relating to the subject lands, (5) the pages from the recently installed records of the Denver land office covering all actions that have occurred with respect to the subject lands, (6) the serial register pages from the serial register books of the Denver land office containing entries in abstract form with respect to certain types of action that have taken place with respect to the subject land, and (7) a diagram showing the lands covered by the subject claims.

Chronologically the history of the action that has taken place with respect to these lands as shown by the records of the Bureau of Land Management is as follows.

In 1916 the entire township was classified as mineral lands valuable as a source of petroleum and nitrogen by reason of the prospective value of the oil shale believed to underlie the lands (Exhibit N).

At the time that the Atlas claims were located the land was vacant, unappropriated public domain with the exception of 80 acres (the E½/SW¼ of Section 14) which was covered by the Atlas No. 10. The SE¼/SW¼ of Section 14 had been patented under

[1] The Washington tract book pages covering the lands included in the Atlas claims were placed in Exhibit GG—3 relating to the Camp Bird claims, and the Washington tract book pages with respect to the Camp Bird claims were placed in Exhibit GG—1 relating to the Atlas claims.

a cash entry (GS 0490) on June 19, 1911, without a reservation of oil, gas, oil shale, or other minerals to the United States.[8] The NE¼/SW¼ of Section 14 had been patented under a cash entry (GS 011822) on July 13, 1917, which reserved the oil shale to the United States under the Act of July 17, 1914, 38 Stat. 509, 30 U.S.C. 121, *et seq.*[9]

On September 4, 1919, an isolated tract application was made for a Cash Entry Patent on 40 acres covered by the Atlas claims (GS 017374). The sale was made at $3.00 per acre on May 6, 1921, and a patent was issued on October 20, 1921, with a reservation of the oil shale to the United States under the Act of July 17, 1914, *supra.*[10]

In 1920 two applications were made for Additional Stock Raising Homestead Entries (GS 018904 and GS 019055) for a total of 480 acres included within the Atlas claims. By 1922 these two applications were rejected or released.

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[8] It seems somewhat unusual that the mining claimants would locate a mining claim on lands that had previously been patented without a reservation of any minerals to the United States.

[9] The Act of July 17, 1914, *supra*, specifically provided that the reserved deposits would be "subject to disposal by the United States only as shall be hereafter expressly directed by law." The direction for disposal did not come until the Mineral Leasing Act of February 25, 1920, was enacted. The situation here is different from the homesteads that cover a portion of the Bute claims and that are discussed in footnote 1. At the time the Bute claims were located the homesteads, although subsisting entries, had not as yet gone to patent with a reservation of minerals under the 1914 act to the United States.

[10] There is nothing to indicate that the mining claimants protested or took any action as of the time the entry was being made or the patent was issued.

On April 24, 1922, two more applications were filed for Stock Raising Homestead Entries (D 033057 or GS 021842 and D 033059 or GS 021845) for a total of 240 acres of the lands. These entries were allowed on January 15, 1924, but the applicants failed to make proof of their entries and on April 26, 1929, the entries were cancelled.

In 1927 three applications for Oil and Gas Prospecting Permits were made (D 038960, D 038980, and D 039252) covering 1,240 acres of the lands. The permits that were issued on all three applications were exchanged for oil and gas leases dated December 31, 1938, and these leases remained in existence until they expired or were cancelled in 1941.[11]

On April 15, 1930, by Executive Order No. 5327 the entire township was withdrawn under the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), from lease or other disposal and reserved for the purpose of investigation, examination and classification (Exhibit Q).

On April 3, 1931, the Act of February 28, 1931 (46 Stat. 1484) was construed to permit stock-raising homestead applications to be made for lands covered by the Executive withdrawal of April 15, 1930 (Exhibit Q). As of July 18, 1934, all stock-raising homestead designations were cancelled in the township by Order No. 130.

By Executive Order of February 6, 1933, the oil shale withdrawal of April 15, 1930, was modified to permit the issuance of oil and gas permits and leases

[11] Again, there is nothing to indicate that any protest, contest or any other action was taken by the mining claimants in connection with the issuance of prospecting permits and leases covering most of the lands included within the subject mining claims.

under the Mineral Leasing Act of February 25, 1920 (Exhibit Q).

On May 13, 1935, the oil shale withdrawal of April 15, 1930, was further modified to permit the issuance of sodium permits and leases under the Mineral Leasing Act of February 25, 1920 (Exhibit Q).

The entire township was withdrawn on July 23, 1934, from settlement, location, sale or entry and reserved for classification and pending determination of the most useful purpose such land could be put to under the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269) (Exhibit R). This action was subsequently cancelled on March 28, 1939.

On September 19, 1934, the entire township was temporarily withdrawn from disposal of any kind subject to any and all existing valid rights until the matter of permanent restoration to the Ute Indians as authorized by Section 3 of the Act of June 28, 1934 (48 Stat. 964) could be given appropriate consideration (Exhibit P). This withdrawal was revoked on December 8, 1938, pursuant to Section 6 of the Act of June 28, 1938 (52 Stat. 1209) which prohibited the restoration of certain lands in the State of Colorado to tribal ownership under the provisions of the Act of June 18, 1934 (Exhibit P).

One Stock Raising Homestead Entry application was made on August 10, 1931 (D 044252). This application, which covered 320 acres was allowed on August 2, 1935, but the entryman failed to take further action on his entry and it was cancelled on December 12, 1940.

Shortly after the passage of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269) the lands within the Atlas claims were placed in a Grazing District. Grazing permits and/or licenses have been issued under the Taylor Grazing Act covering the lands within

the Atlas claims over the past 30-year period (Exhibit KK).

In 1951 and 1952 four applications for oil and gas leases were made on the lands covered by the Atlas claims. Leases issued on these applications (C 03458, C 03493, C 03623 and C 03895) covering 1,400 acres, practically all of the lands within the Atlas claims. As soon as these leases expired, other oil and gas lease applications were filed, new leases were issued, and the lands were almost continually covered by oil and gas leases from 1952 to the present time.

When the assignment of lease C 03458 A expired on October 31, 1963, a new application was filed November 26, 1963, and the lease that issued upon that application (C 0116038) is still in existence. When C 03493 expired on November 30, 1960, part of the land covered by that lease was filed on December 27, 1960, by application C 053905 which is still pending. The rest of the land was applied for on February 25, 1963, and the application (C 012906) is still pending. When oil and gas lease C 03623 expired on January 29, 1955, two new applications (C 09754 and C 09965) were filed on November 30, 1954, and January 1, 1955. Leases issued on these applications and the first lease (C 09754) is still in existence and the second lease expired April 30, 1962. The lands vacated by the expiration of the second lease (C 09965) were covered by a subsequent lease (C 0111398) which is in existence today. When the last of the 1951-1952 leases expired (C 03895) on April 28, 1959, a new application (C 028378) was filed within five days. The lease on this new application expired May 31, 1963, and a new lease (C 0109516) was applied for within a month and this lease is still extant.

On the said lands a Bureau of Land Management Range Improvement Project No. 1-C-238, a reservoir,

was constructed in the NW¼ of Section 10. This was done sometime between 1951 and 1961 (Exhibit KK).

III. The Camp Bird Nos. 1 through 20.

These claims were located in January of 1920 and cover the W½ and the SW¼ of Section 2, all of Sections 3, 4, 9 and 16 and the SE¼ of Section 17, Township 4 South, Range 95 West. The history of these lands is shown by Exhibit GG—3. This exhibit contains copies of (1) the tract book pages previously maintained in the Denver land office containing entries relating to the subject lands, (2) the plat book pages maintained in the Denver land office relating to the subject lands, (3) the tract book pages maintained in the Washington office of the Bureau of Land Management containing entries relating to the subject lands,[12] (5) the pages from the recently installed records of the Denver land office covering all actions that have occurred with respect to the subject lands, (6) the serial register pages from the serial register books of the Denver land office containing entries in abstract form with respect to certain types of action that have taken place with respect to the subject land, and (7) a diagram showing the lands covered by the subject claims.

Chronologically the history of the action that has taken place with respect to these lands as shown by the records of the Bureau of Land Management is as follows:

In 1916 the entire township was classified as mineral lands valuable as a source of petroleum and ni-

[12] The Washington tract book pages covering the lands included in the Camp Bird claims were placed in Exhibit GG—1 relating to the Atlas claims.

trogen by reason of the prospective value of the oil shale believed to underlie the lands (Exhibit N).

At the time the Camp Bird claims were located the land was vacant, unappropriated public domain with the exception of 120 acres in Section 2 which were part of a homestead entry that had been filed September 19, 1916 (GS 011131). The lands in this entry were patented under the homestead laws on May 13, 1921, with a reservation to the United States of the oil shale under the Act of July 17, 1914, *supra*.[13] In addition, at the time the claims were allegedly located an application was pending for an additional stock raising homestead entry that had been filed on September 4, 1919, covering 40 acres of the lands (GS 017369). The application was allowed in 1922 but relinquished in 1928.

On June 10, 1920, a homestead entry was filed on 200 acres of the said lands (GS 019292) which was allowed but relinquished by 1926. As soon as it was relinquished a stock-raising homestead application was filed upon the 200 acres and 200 additional acres (GS 030327), but this application was rejected in 1927. In 1928 an application for a stock-raising homestead entry was made on 40 acres (D 040368) which was allowed in 1929 but cancelled in 1934.

In July of 1927, two applications for oil and gas prospecting permits under the Mineral Leasing Act of February 25, 1920, were filed. The resulting permits (D 038959 and D 038997), covering 2,720 acres of the said lands (all except the 480 acres in Section 2), were exchanged for oil and gas leases on December 31, 1938, but these leases were cancelled or relinquished in 1941.[14]

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[13] See the comments in footnotes 1 and 2, *supra*, in connection with the Bute claims.

[14] There is nothing in the records of the Bureau of Land Management to indicate that any protest, contest, or any

On April 15, 1930, by Executive Order No. 5327 the entire township was withdrawn under the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), from lease or other disposal and reserved for the purpose of investigation, examination and classification (Exhibit Q).

On April 3, 1931, the Act of February 28, 1931 (46 Stat. 1484) was construed to permit stock-raising homestead applications to be made for lands covered by the Executive withdrawal of April 15, 1930 (Exhibit Q). By Order No. 130 all designations for stock-raising homestead entries under the Act of December 29, 1916, were cancelled in the township.

By Executive Order of February 6, 1933, the oil shale withdrawal of April 15, 1930, was modified to permit the issuance of oil and gas permits and leases under the Mineral Leasing Act of February 25, 1920 (Exhibit Q).

On May 13, 1935, the oil shale withdrawal of April 15, 1930, was further modified to permit the issuance of sodium permits and leases under the Mineral Leasing Act of February 25, 1920 (Exhibit Q).

The entire township was withdrawn on July 23, 1934, from settlement, location, sale or entry and reserved for classification and pending determination of the most useful purpose such land could be put to under the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269) (Exhibit R). This action was subsequently cancelled on March 28, 1939.

On September 19, 1934, the entire township was temporarily withdrawn from disposal of any kind

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other action was taken by the mining claimants in connection with the issuance of prospecting permits and leases covering most of the lands included within the subject mining claims.

subject to any and all existing valid rights until the matter of the permanent restoration to the Ute Indians as authorized by Section 3 of the Act of June 28, 1934 (48 Stat. 964) could be given appropriate consideration (Exhibit P). This withdrawal was revoked on December 8, 1938, pursuant to Section 6 of the Act of June 28, 1938 (52 Stat. 1209) which prohibited the restoration of certain lands in the State of Colorado to tribal ownership under the provisions of the Act of June 18, 1934 (Exhibit P).

Shortly after the passage of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269) the lands within the Camp Bird claims were placed in a Grazing District. Grazing permits and/or licenses have been issued under the Taylor Grazing Act covering the lands within the Camp Bird claims over the past 30-year period (Exhibit KK).

In 1945 2,080 acres of the said lands were subject to applications for oil and gas leases (053584, 053585, and 053586). These applications were subsequently withdrawn.

In 1951 three applications were filed for oil and gas leases on the said lands (C 03017, C 03019 and C 03458). Oil and gas leases were issued upon these applications which covered all 3,200 acres within the Camp Bird claims. These leases expired in 1959, 1960 and 1963, respectively. Within three months after the expiration date of these leases, new applications were filed upon the vacated lands. Two leases were issued on these applications (C 034229 and C 0116038) covering 1,760 acres of the subject lands. These leases are still in existence. The application for the remaining 1,440 acres in the subject lands (C 051772) is still pending.

Various range improvements have been made upon the subject lands pursuant to the Taylor Grazing Act.

There have been three reservoirs placed upon the land (Project 1-C-235, SE¼SE¼ Section 4; Project N 1-C-234, NW¼SE¼ Section 9; and Project C-1-424, SE¼ Section 17). A half-moon fence was constructed on the NW¼ Section 2 and E½SE¼ Section 3 (01-129).

IV. The Carbon Nos. 1 through 5 and the Elizabeth Nos. 1, 2 and 4 through 12.

These claims were located in April and May of 1918, and cover the N½N¼ of Section 32, all of Sections 33, 34, and 35, and the N½N½ and the S½ of Section 36. Township 4 South, Range 97 West. The 16 claims cover a total of 2,560 acres. The history of these lands is shown by Exhibit FF. This exhibit contains copies of (1) the tract book pages previously maintained in the Denver land office containing entries relating to the subject lands, (2) the plat book pages maintained in the Denver land office relating to the subject lands, (3) the tract book pages maintained in the Washington office of the Bureau of Land Management containing entries relating to the subject lands, (4) the plat book pages maintained in the Washington office of the Bureau of Land Management relating to the subject lands, (5) the pages from the recently installed records of the Denver land office covering all actions that have occurred with respect to the subject lands, (6) the serial register pages from the serial register books of the Denver land office containing entries in abstract form with respect to certain types of action that have taken place with respect to the subject land, and (7) a diagram showing the lands covered by the subject claims.

Chronologically the history of the action that has taken place with respect to these lands as shown by

the records of the Bureau of Land Management is as follows:

In 1916 the entire township was classified as mineral lands valuable as a source of petroleum and nitrogen by reason of the prospective value of the oil shale believed to underlie the lands (Exhibit N).

At the time the Carbon and Elizabeth claims were located the land was vacant, unappropriated public domain with the exception of 80 acres on which an application for a homestead entry had been filed on September 13, 1919 (GS 017477). This entry was allowed on November 29, 1919, but subsequently relinquished by January 8, 1921.

In 1920 seven agricultural entries were made on the subject lands (GS 019033, GS 019034, GS 019046, GS 019047, GS 020211, GS 020212, and GS 020213) covering approximately 1,000 acres. All of these entries were allowed, but five of them were subsequently relinquished or cancelled. Two of the entries (GS 019046 and GS 019047), covering 440 acres, were subsequently patented in 1924 and 1926, respectively, with a reservation of oil shale to the United States under the Act of July 17, 1914, *supra*.[15]

On April 28, 1926, a stock-raising homestead entry was filed on 120 acres of the subject lands (GS 040215). This application was cancelled in 1930.

In 1931 an additional stock-raising homestead entry was filed on 120 acres of the subject lands (D 044042). This entry was allowed on August 2, 1935, but was subsequently cancelled in 1936.

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[15] There is nothing to show that the mining claimants protested, contested or took any action when these homestead entries were made, during the time the necessary homestead improvements were being completed, or during the time that notice of intention to submit final proof was published in the *White River Review* in Rifle, Colorado.

An application for an oil and gas prospecting permit including 640 acres of the said lands was filed in 1932 and a permit was issued in 1933 (D 044989). This permit was cancelled in 1940.[16]

On April 15, 1930, by Executive Order No. 5327 the entire township was withdrawn under the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), from lease or other disposal and reserved for the purpose of investigation, examination and classification (Exhibit Q).

On April 3, 1931, the Act of February 28, 1931 (46 Stat. 1484) was construed to permit stock-raising homestead applications to be made for lands covered by the Executive Withdrawal of April 15, 1930 (Exhibit Q). All stock-raising homestead entry designations in the township were revoked on July 10, 1934.

By Executive Order of February 6, 1933, the oil shale withdrawal of April 15, 1930, was modified to permit the issuance of oil and gas permits and leases under the Mineral Leasing Act of February 25, 1920 (Exhibit Q).

On May 13, 1935, the oil shale withdrawal of April 15, 1930, was further modified to permit the issuance of sodium permits and leases under the Mineral Leasing Act of February 25, 1920 (Exhibit Q).

The entire township was withdrawn on July 23, 1934, from settlement, location, sale or entry and reserved for classification and pending determination of the most useful purpose such land could be put to

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[16] There is nothing in the records of the Bureau of Land Management to indicate that any protest, contest or any other action was taken by the mining claimants in connection with the issuance of the prospecting permit and the lease.

under the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269) (Exhibit R.) This action was subsequently cancelled on March 28, 1939.

On September 19, 1934, the entire township was temporarily withdrawn from disposal of any kind subject to any and all exising valid rights until the matter of permanent restoration to the Ute Indians as authorized by Section 3 of the Act of June 28, 1934 (48 Stat. 964) could be given appropriate consideration (Exhibit P). This withdrawal was revoked on December 8, 1938, pursuant to Section 6 of the Act of June 28, 1938 (52 Stat. 1209) which prohibited the restoration of certain lands in the State of Colorado to tribal ownership under the provisions of the Act of June 18, 1934 (Exhibit P).

Shortly after the passage of the Taylor Grazing Act of June 28, 1934, (48 Stat. 1269) the lands within the claims were placed in a Grazing District. Grazing permits and/or licenses have been issued under the Taylor Grazing Act covering the lands within the Carbon and Elizabeth claims over the past 30-year period (Exhibit JJ).

On June 24, 1947, four applications for oil and gas leases were filed covering all of the subject lands (D 055616, D 055617, D 055618 and D 055619). Leases issued pursuant to these applications and they remained in existence until 1962 when they expired or were cancelled.

In 1962 four more applications for oil and gas leases were filed upon the subject lands (C 091211, C 091475, C 095552, and C 095492). These applications covering 2,480 acres of the land included within the mining claims are being held in abeyance at the present time because of the application for mineral patent covering the subject claims that was filed in 1959.

V. The Northwest, the Northeast and the Southeast Claims.

These claims were located in July of 1918, on the N½NW¼, SW¼NW¼, NE¼ and SE¼ of Section 27, Township 7 South, Range 98 West. The claims cover 440 acres of land. The history of these lands is shown by Exhibit EE. This exhibit contains copies of (1) the tract book pages maintained in the Denver land office containing entries relating to the subject lands, (2) the plat book pages maintained in the Denver land office relating to the subject lands, (3) the tract book pages maintained in the Washingon office of the Bureau of Land Management containing entries relating to the subject lands, (4) the plat book pages maintained in the Washington office of the Bureau of Land Management relating to the subject lands and (5) the serial register pages from the serial register books of the Denver land office containing entries in abstract form with respect to certain types of action that have taken place with respect to the subject lands.

Chronologically the history of the action that has taken place with respect to these lands as shown by the records of the Bureau of Land Management is as follows.

In 1916 400 acres of the subject lands were classified as mineral lands valuable as a source of petroleum and nitrogen by reason of the prospective value of the oil shale believed to underlie the lands (Exhibit N).

At the time the Northwest, the Northeast and the Southeast claims were located the land was vacant, unappropriated public domain. On July 9, 1923, by Executive Order 3867, the entire township was withdrawn from settlement, location, sale, entry and all forms of appropriation pending a resurvey. The resurvey was filed and accepted in 1926.

On April 15, 1930, by Executive Order No. 5327 the entire Section was withdrawn under the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), from lease or other disposal and reserved for the purpose of investigation, examination and classification (Exhibit Q).

On April 3, 1931, the Act of February 28, 1931 (46 Stat. 1484) was construed to permit stock-raising homestead applications to be made for land covered by the Executive Withdrawal of April 15, 1930 (Exhibit Q). Order No. 130 of July 18, 1935, cancelled all stock-raising homestead designations.

By Executive Order of February 6, 1933, the oil shale withdrawal of April 15, 1930, was modified to permit the issuance of oil and gas permits and leases under the Mineral Leasing Act of February 25, 1920 (Exhibit Q).

On May 13, 1935, the oil shale withdrawal of April 15, 1930, was further modified to permit the issuance of sodium permits and leases under the Mineral Leasing Act of February 25, 1920 (Exhibit Q).

The entire township was withdrawn on July 23, 1934, from settlement, location, sale or entry and reserved for classification and pending determination of the most useful purpose such land could be put to under the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269) (Exhibit R). This action was subsequently cancelled on March 28, 1939.

On September 19, 1934, the entire township was temporarily withdrawn from disposal of any kind subject to any and all existing valid rights until the matter of the permanent restoration to the Ute Indians as authorized by Section 3 of the Act of June 28, 1934 (48 Stat. 964) could be given appropriate consideration (Exhibit P). This withdrawal was re-

voked on December 8, 1938, pursuant to Section 6 of the Act of June 28, 1938, (52 Stat. 1209) which prohibited the restoration of certain lands in the State of Colorado to tribal ownership under the provisions of the Act of June 18, 1934 (Exhibit P).

Shortly after the passage of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269) the lands within the claims were placed in a Grazing District. Grazing permits and/or licenses have been issued under the Taylor Grazing Act covering the lands over the past 30-year period (Exhibit II).

In January of 1952 an application for an oil and gas lease was filed (C 04225) covering all of the lands within the claims. A lease was issued effective June 1, 1952. The lease expired in May of 1961. Soon after this lease expired another application for an oil and gas lease was filed on the subject lands (C 065809). This lease was suspended as to the subject lands due to conflict with the mineral patent application (C 02875) filed for the Northwest, Northeast and Southeast mining claims in 1959. The oil and gas application was withdrawn as to the subject lands in 1966.

VI. The Oyler Nos. 1 through 4.

These claims were located in September of 1916 and allegedly cover land in Sections 10, 11 and 12, Township 6 South, Range 95 West. The history of these lands is shown by Exhibit DD. This exhibit contains copies of (1) the tract book pages previously maintained in the Denver land office containing entries relating to the subject lands, (2) the plat book pages maintained in the Denver office relating to the subject lands, (3) the tract book pages maintained in the Washington office of the Bureau of Land Management containing entries relating to the subject lands, (4) the plat book pages maintained in the Washington office of the Bureau of Land

Management relating to the subject lands, (5) the pages from the recently installed records of the Denver land office covering all actions that have occurred with respect to the subject lands, (6) the serial register pages from the serial register books of the Denver land office containing entries in abstract form with respect to certain types of action that have taken place with respect to the subject lands, and (7) a mineral survey obtained by the mining claimants showing the location of the subject claims.

Chronologically the history of the action that has taken place with respect to these lands as shown by the records of the Bureau of Land Management is as follows.

In 1916 the subject lands were classified as mineral lands valuable as a source of petroleum and nitrogen by reason of the prospective value of the oil shale believed to underlie the lands (Exhibit N).

By Executive Order of December 6, 1916, all the subject lands were withdrawn and reserved as Naval Oil Shale Reserve No. 1 (Exhibit O). As a result of this withdrawal within three months after the alleged location of the Oyler claims no other action has been taken with respect to the subject lands. The only exception was an application for an oil and gas lease which was filed on October 4, 1954, covering the subject lands, which was rejected because of the Naval Oil Shale Reserve (C 09350). The lands were included in the various withdrawals between 1930 and 1934 noted in connection with the other mining claims; however, the withdrawals were not of any consequence due to the previous inclusion of the lands within the Naval Reserve.

As part of the experimental efforts of the U. S. Bureau of Mines to produce synthetic liquid fuel from oil shale, certain facilities were constructed on

the Oyler No. 4 claim by the Bureau of Mines. (Exhibit LL).

Grazing permits and/or licenses have been issued under the Taylor Grazing Act covering the lands within the claims pursuant to an agreement between the Department of the Navy and the Bureau of Land Management (Exhibit HH).

VII. Summary.

In 1935, when the Department of the Interior allegedly adopted a rule giving life to the thousands of oil shale claims that had previously been declared null and void, the following rights had attached to the lands included within the subject mining claims.

1. All of the lands had been withdrawn by the Mineral Leasing Act of February 25, 1920, from disposition under the mining laws, and reserved for disposition under a leasing system with provisions for rentals, royalties, and continuing supervision and control in favor of the public as a whole. If the claims were effectively declared invalid, then the rights of the public as a whole created by the Mineral Leasing Act of 1920 attached to the lands.

2. All of the lands had been withdrawn and reserved from disposition by Presidential Orders of April 15, 1930, and July 23, 1934, pending investigations and determinations as to the most appropriate use the land might be put to for the benefit of the public as a whole.

3. All of the lands had been withdrawn pursuant to an act of Congress in 1934 pending a determination as to whether the lands would be restored to the Ute Indians. In addition to the inchoate interest created by the act of Congress and the subsequent withdrawal, the Ute Indians had pre-existing interests in the lands stemming from a Treaty of 1880

(Exhibit P).[1] If the claims were effectively declared invalid, then the inchoate rights of the Ute Indians created by the act of Congress and the withdrawal order may have attached to the lands.

4. All of the lands within the Oyler claims had been withdrawn by Presidential Order of December 6, 1916, and placed within a Naval Oil Shale Reserve. The lands and the oil shale deposits within the lands were placed under the administration of the Department of the Navy for the benefit of the public as a whole.

5. 1400 acres (800 within the limits of the Bute claims, 40 within the Atlas claims, 120 within the Camp Bird claims, and 440 within the Carbon and

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[1] In *The Confederated Bands of Ute Indians* v. *The United States* (1943) (100 Ct. C. 413, the following statements were made:

> "No judicial decision has been called to our attention which is not consistent with the Indians' claim that, under the agreement of 1880, they retained an interest in their former reservation. Statements that the United States was, in comparable situations, a trustee for the Indians for the purpose of selling the land, appear in the opinions of the Supreme Court of the United States in a number of cases. The most pointed of these statements are in *United States* v. *Brindle,* 110 U.S. 688, 693; *Minnesota* v. *Hitchcock,* 185 U.S. 373, 394; and *United States* v. *Mille Lac Band,* 229 U.S. 498."
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> * * * *
>
> "We do not think it is necessary in the instant case to determine whether the Government was, in the ordinary sense of that word, a trustee of the lands in question for the plaintiffs. We think it is enough to determine, and we do determine, that under the agreement of 1880, the plaintiff Indians retained an interest in the lands, which interest was completely destroyed by the United States when it inserted the Adams amendment in the 1938 act."

Elizabeth claims) had been patented under the nonmineral land laws pursuant to entries that had been made subsequent to the time of the alleged location of the mining claims. While the lands were patented with a reservation of minerals under either the Act of July 17, 1914, *supra*, or the Stock-Raising Homestead Act of December 29, 1916, 39 Stat. 862, 43 U.S.C. 291 *et seq.*, it does not necessarily follow that the homesteaders would not have been prejudiced by a disposition of the reserved minerals under the mining laws rather than under the mineral leasing law of 1920.[2]

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[2] The Act of July 17, 1914, *supra*, authorized the division of certain lands into two estates for the purpose of disposal, but specifically provided that the reserved deposits would be "subject to disposal by the United States only as shall be hereafter expressly directed by law." The direction for disposal was subsequently provided by the Mineral Leasing Act of February 25, 1920. By the 1914 act, a servitude was placed upon the surface estate for the benefit of any mineral estate that might be created in the reserved deposits, but the obligation was placed upon the holder of any such dominant estate that might subsequently be created to pay the owner of the servient estate any damages caused by entering and occupying the surface. The liability was created by the statute.

The law is unchartered as to whether the liability provisions of the act apply only where the reserved deposits are disposed of by the United States as was subsequently provided by the Mineral Leasing Act of 1920 or whether the provisions extend to rights acquired under the mining laws if there is a subsequent disposition of the surface of the lands under the 1914 act.

In *James W. Bell* (1927) 52 L.D. 197, the First Assistant Secretary stated in part as follows:

> "Here the locator has notice, merely constructive, that Helm had applied for a patent for the surface of the land, not that a proceeding was pending that would destroy his property right. Had he actual notice he might have concluded that he did not object to the issuance of a surface

patent that would reserve to the Government and its grantees the minerals and so much of the surface as might be necessary to extract the same. While under the law the department is without authority to issue to him a patent for the minerals alone, it does not necessarily follow that his right to them was forfeited by the issuance of a patent for the surface; or, in other words, that a lack of jurisdiction to do one thing does not necessarily confer authority upon the department to do something wholly different, namely, to declare forfeited a right lawfully acquired."

The *Bell* decision went on to conclude that if the mining claimant could obtain a deed to the surface and if he reconveyed the surface to the United States, the outstanding surface patent could be cancelled, and a mineral patent issued to the mining claimant for both the surface and the minerals. If the foregoing is a sound construction of the rights of a mining claimant, then it can convincingly be argued that the right acquired under the mining laws was not restricted by the imposition of a liability created by Congress in providing for the creation of separate estates and the disposition of only the surface estate. In other words, if a mining claimant does not assert his pre-existing rights under the mining laws and permits a subsequent homestead entryman to obtan a patent to the surface of the lands, he does not thereby subject himself to the liability provisions created by Congress and which are operative only in the event the reserved deposits are disposed of in the manner subsequently directed by Congress in the Mineral Leasing Act.

The Act of July 20, 1956, 70 Stat. 592, 30 U.S.C. 122, amended the 1914 Act to provide for the issuance of a patent under the mining laws where the surface had previously been patented under the 1914 act. Presumably if one obtained a patent to a mining claim under this act, rather than simply working his claim as an unpatented claim, he would subject himself to the liability imposed by the statute.

The same argument would apply to entries under the Stock-Raising Homestead Act of December 29, 1916, *supra*, with respect to prior mineral claims. (Compare Vol. 1, American Law of Mining, Sec. 3.47.)

[Footnote continued on page 179]

6. 320 acres within the Atlas claims were included in a pending stock-raising homestead entry which was subsequently allowed on August 2, 1935. A recognition of the validity of mining claims that had previously been declared invalid could completely destroy the rights of the homesteader under this entry. If the mining claimant protested the final proof under the homestead laws and showed a prior valid mining claim, the homestead entry would have been cancelled.[3]

7. 12,280 acres (7,680 within the limits of the Bute claims, 1,240 within the Atlas claims, 2,720 within the Camp Bird claims, 640 within the Carbon and Elizabeth claims) were included in outstanding oil and gas prospecting permits issued under the Mineral Leasing Act of 1920. If the mining claims had effectively been declared null and void, then the oil and gas prospecting permits would have been good. A recognition of the validity of mining claims that had previously been declared null and void would completely destroy the rights of the oil and gas permittees.

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[3] [Continued]

Under this argument a homesteader would have less rights if a pre-existing mining claim were determined to be valid than he would have if the minerals were disposed of under the Mineral Leasing Act.

[3] Compare the case of *Freeman* v. *Summers* (1927) 52 I.D. 201 (Exhibit 3) where the homestead entries were cancelled in favor of pre-existing oil shale claims. In the *Freeman-Summers* fiasco the mining claims were subsequently declared invalid on an assessment work charge, the homesteads were reinstated and patents were issued in 1932 under the homestead laws. If a blanket rule was adopted in 1935 breathing life back into the Freeman mining claims then the homestead patents were improperly issued and were held under a constructive trust by Summers for the benefit of Freeman.

It is inconceivable that the Secretary of the Interior could in 1935 have exercised his supervisory authority on a blanket basis or have adopted a rule of general application recognizing the validity of thousands of oil shale claims that had previously been declared null and void and thereby automatically destroy the rights that had been created in the lands by the action of Congress, the President and the Department of the Interior. Even assuming *arguendo* that the Presidential and Congressional withdrawals that attached to the lands would not have prevented the Secretary from giving life to oil shale claims that had been declared null and void, it seems clear that any such action by the Secretary would have had to have been on an individual case basis with appropriate consideration being given the rights that had attached to the specific lands.

At the present time, when a question exists concerning the exercise of supervisory authority by the Secretary of the Interior to give life to the thousands of oil shale claims that had previously been declared null and void, the following rights have attached to the lands included within the subject mining claims:

1. All of the lands have been withdrawn by Congressional action under the 1920 Mineral Leasing Act and reserved for disposition under a leasing system with provisions for rentals, royalties and continuing supervision and control in favor of the public as a whole.

2. All of the lands have been withdrawn by Presidential action under the Executive Order of April 15, 1930.

3. All of the lands within the Oyler claims have been withdrawn by Presidential Order and placed under the administration of the Department of the Navy.

4. 1,400 acres have been patented under the nonmineral land laws pursuant to entries made subsequent to the time of the alleged location of the claims.

5. 8,860 acres (5,900 acres within the limits of the Bute claims, 1,200 acres within the Atlas claims, and 1,760 acres within the Camp Bird claims) are included in outstanding oil and gas leases issued under the Mineral Leasing Act of 1920.

6. 5,280 acres (1,200 acres within the limits of the Bute claims, 80 acres within the Atlas claims, 1,440 acres within the Camp Bird claims, and 2,560 acres within the Carbon and Elizabeth claims) are included in pending applications for oil and gas leases.

7. All of the lands, except those patented under the homestead laws, are used in support of livestock operations pursuant to the Taylor Grazing Act. Reservoirs, fences and other range improvements have been constructed on the lands in accordance with cooperative projects between livestock operators and the Bureau of Land Management.

8. Reservoirs and other facilities used by the Bureau of Mines in connection with its experimental oil shale operations at Rifle, Colorado, have been constructed on a portion of the lands allegedly embraced within the Oyler claims.

If the assessment work decisions were effective when rendered, if the Interior Department had the requisite jurisdiction to construe the law in discharging its duties and responsibilities of investigating and determining the validity of claims asserted to the public lands, then it is inconceivable that the action of the present Secretary was arbitrary, capricious or contrary to the law in refusing to exercise his supervisory authority and breathe life into the thousands of oil shale claims that had previously

been declared null and void. It seems abundantly clear that the action that the Secretary took was the only proper course that could have been taken under the circumstances. Certainly the Secretary in the discharge of his duties to the public as a whole and the specific individuals who had acquired rights in the lands could not properly destroy the rights created by Congress, the President and the Department of the Interior in favor of such individuals as Tell Ertl, who searched out and purportedly revived claims that had lain stagnant for some 45 years. The Secretary could not properly have vacated decisions that were effective for some 30 years and permit recent-day speculators, such as Tell Ertl, to obtain rights in lands that had increased in value over the years from little or nothing to hundreds of dollars an acre to the prejudice of the interests of the public as a whole and the specific individuals who had acquired valuable rights in the lands as a result of the inaction and dereliction of mining claimants who had long ago lost all interest in the lands.

The following comments of the court in *Gabbs Exploration Company* v. *Udall* (1963, C.A.D.C.) involving oil shale claims are particularly appropriate:

> "Plaintiff's predecessors in interest might have corrected these errors or defects, if errors or defects there were, by timely appeal to the Secretary of the Interior from the decision of the Commissioner of the General Land Office. As timely appeal was not taken then, it is now too late for plaintiff to seek to correct any errors or defects by collateral attack.
>
> ". . . Plaintiff's predecessors not only did not interpose a demurrer, but failed to appeal from the decision against them. Any defect could have

been and should have been cured upon appeal. . . . As it was not done then, it should not be done now by collateral attack where no jurisdictional defect appears which justifies overturning a settled decision."

* * * *

"We need not consider whether the power to reopen prior decision is merely discretionary with the Secretary or whether, indeed, the errors urged by plaintiff demonstrate that 'manifest injustice has been done or the law clearly misapplied,' as is required for reopening. Even if we assume that Gabbs has met these threshold objections, plaintiff's argument cannot prevail. The Department of the Interior, which has recognized the right of the Secretary to reconsider certain prior decisions, has also recognized that there must be some time limit on such reconsideration. . . ."

"Here neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plaintiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years. . . ."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 371091 380

INDEX

	PAGE
Statement	1
The Compass (*Napier*) Claims and the Application to Patent Them	3
The Oyler (*Brown*) Claims and the Application to Patent Them	5
Rejection of the Patent Applications	8
Summary of Argument	11
Argument	13
I. The *Union Oil* proceeding cannot sustain a decision in the Government's favor since it purported to invalidate valuable property rights on the basis of controverted propositions of fact and of law without affording notice and an opportunity for hearing, thereby offending Due Process, the Administrative Procedure Act, and Interior's own regulations	13
II. The proceedings in the lower courts provide adequate and appropriate bases for a ruling in the oil shale claimants' favor	18
Conclusion	21

Citations

Cases:

Adams v. *Witmer*, 271 F.2d 29 (9th Cir. 1958)	16
Best v. *Humboldt Mining Co.*, 371 U.S. 334	15
Columbia Research Corp. v. *Schaffer*, 256 F.2d 677 (2d Cir. 1958) *vacated on other grounds*, 256 F.2d at 680-681	17

PAGE

Costello v. *United States*, 365 U.S. 265 19

Crowell v. *Benson*, 285 U.S. 22 15

Gardner v. *Panama R. Co.*, 342 U.S. 29 19

Gonzales v. *United States*, 348 U.S. 407 15

Gutierrez v. *Waterman S.S. Corp.*, 373 U.S. 206 ... 19

Holmberg v. *Armbrecht, et al.*, 327 U.S. 392 19

Ickes v. *Virginia-Colorado Development Corp.*, 295 U.S. 639 .....9, 14, 17, 20

Interstate Commerce Commission v. *Louisville & Nashville R.R.*, 227 U.S. 88 15

Kosty v. *Lewis*, 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 19

Morgan v. *United States*, 304 U.S. 1 15

Morgan v. *United States*, 298 U.S. 468 15

Ohio Bell Telephone Co. v. *Public Util. Comm'n*, 301 U.S. 292 15

Powell v. *Zuckert*, 366 F.2d 634 (D.C. Cir. 1966) .. 19

Republic Aviation Corp. v. *NLRB*, 324 U.S. 793 ... 15

Securities Comm'n v. *Chenery Corp.*, 318 U.S. 80 .. 18

TransWorld Airlines v. *CAB*, 254 F.2d 90 (D.C. Cir. 1958) 17

United States v. *Morton Salt Co.*, 338 U.S. 632 16

Wilbur v. *Krushnic*, 280 U.S. 306 ..... 7, 13

Wong Yang Sung v. *McGrath*, 339 U.S. 33 17

INTERIOR DECISIONS:

Union Oil Company of California, et al., 71 I.D. 169 .....2, 3, 13-14, 16, 17, 19-21

United States v. *O'Leary*, 63 I.D. 341 16

PAGE

STATUTES:

Act of May 10, 1872, 17 Stat. 92 as amended, 30 U.S.C.A. 28 13

MISCELLANEOUS:

Code of Federal Regulations

43 C.F.R. 3450 13

43 C.F.R. 3452 16

43 C.F.R. 3470 13

2 Davis, *Administrative Law* 236, n. 2 (1958 ed.) .. 17

IN THE

Supreme Court of the United States

No. 221

October Term, 1969

WALTER J. HICKEL, Secretary of the Interior,
Petitioner,

v.

BARNETTE T. NAPIER, GRACE A. SAVAGE, JOAN L. SAVAGE, MAUDE B. FARNUM, ST. CLAIR NAPIER CATLIN, WILLIAM H. FARNUM, JR., JOHN R. FARNUM, JOHN W. SAVAGE, and NEIL S. MINCER,
Respondents,

WALTER J. HICKEL, Secretary of the Interior,
Petitioner,

v.

PENELOPE CHASE BROWN, Individually and as Trustee, and THE OIL SHALE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Statement

This brief is submitted on behalf of the captioned respondents who were the plaintiffs in two of the four

actions that were covered by the opinions below. These two actions may for convenience be referred to as the *Napier* and *Brown* cases. A separate brief is being submitted on behalf of the respondents The Oil Shale Corporation, *et al.*, in the first of the four actions to have been filed in the District Court (which for convenience may be referred to as the *TOSCO* case). That brief treats several basic matters common to all four actions; this brief adopts that treatment of those matters.[1]

The *TOSCO* case differs from the other three actions principally in that it seeks only direct judicial review of certain administrative proceedings in the Department of the Interior that occurred in the latter 1920's and early 1930's involving allegations that annual assessment work was in default.[2] The other three actions, which likewise seek direct judicial review of similar proceedings in the same period, also attack administrative proceedings in the Department of the Interior in the 1960's which, on the basis of the assessment work proceedings, rejected applications to patent certain oil shale placer mining claims. These latter proceedings culminated in *Union Oil Company of California, et al.*, 71 I.D. 169 (1964), and for convenience will be referred to in this brief simply as the "*Union Oil* proceedings". No patent application has been made for the oil shale claims in the *TOSCO* case, and those claims were not involved in the *Union Oil* proceedings.

This brief focuses upon the *Union Oil* proceedings, particularly insofar as they rejected the patent applications for the respondents' oil shale claims, three of the

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[1] The respondents in the fourth action, Umpleby *et al.*, are filing a separate brief in this Court.

[2] The *Tosco* case also differs from the other three in that it involves assessment work proceedings in which personal jurisdiction was largely lacking.

so-called "Compass" claims[3] owned by Barnette T. Napier, *et al.*, and the so-called Oyler claims Nos. 1-4, owned by Penelope Chase Brown (under lease to The Oil Shale Corporation).

The Compass (*Napier*) Claims and the Application To Patent Them.

The patent application for the Compass claims was filed on June 1, 1959, in the Colorado State Office, Bureau of Land Management. Title and other formal aspects of review of the application by the Land Office indicated that all was in order, and the claim owners were called upon to pay the purchase price, which they did on October 30, 1959.[4] Three Mineral Examiners of the Land Office conducted field investigations of the claims in October and November 1959. In a report dated January 27, 1960, they concluded that the claims were valid and eligible for patent, with the exception of a portion of one of the claims that was non-mineral (and thus not subject to patent under the mining laws), which the claims owners subsequently relinquished.[5]

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[3] The Northeast, Northwest, and Southeast Oil Shale Placer Mining Claims. The fourth "Compass" claim, the Southwest, was never declared invalid for assessment work default, and accordingly *Union Oil* did not reject the patent application as to that claim.

[4] Printed Appendix in this Court (hereinafter "A.") pp. 394, 401 (allegations in paragraph 7 of the Complaint, admitted in the Answer).

[5] Pl. Exs. 155, 216; R. 1964-71, 2105. Each of the four cases below is represented by a separate record. However, at the trial the evidence common to the four cases was entered only in the record of the *Tosco* case and thus is to be found in the record of No. 9581 in the court of appeals. References herein to the record ("R.") are to the record in No. 9581.

Plaintiffs' Exhibits 1-307 were all received in evidence together at R. 863, and subsequent citations of this reference will be omitted to avoid repetition.

The Mineral Examiners also reviewed the Land Office's records of prior investigations of, and proceedings with respect to, the Compass claims. Their report noted that the claims had been contested, and declared invalid in 1931, for default in performance of assessment work. Pl. Ex. 155; R. 1966-67. Their conclusion that the claims were nonetheless eligible for patent undoubtedly reflected their understanding, elsewhere specifically expressed, that the assessment work decisions "did not affect the status of the claims." See, *e.g.*, Pl. Exs. 128, 129; A. 175-177.

The Mineral Examiners' report also listed the eight original locators of the Compass claims, residents in the oil shale area. Pl. Ex. 155, R. 1966. Their interests have devolved upon the respondents herein as follows. Locator B. T. Napier died in 1920, and his interest has passed by inheritance to his descendants, respondents Barnette T. Napier and St. Clair Napier Catlin. Locator Robert Eaton willed his interest to his daughters in 1952, who in 1957 sold it to respondents William H. and John R. Farnum, the sons of the third of the original locators, W. H. Farnum. W. H. Farnum in 1955 deeded his interest to his wife, respondent Maude B. Farnum. The fourth locator, J. L. Armstrong, deeded his interest to his wife in 1925 and in 1953 she sold to respondents, John and Joan Savage, who had the year before purchased from locator Luther Armstrong his interest in the claims. The interest of the sixth locator, Hiram Smith, has passed by deed to John and William Farnum. The last two locators, Morgan McCann and Mark Love, died before 1931, apparently without any surviving relatives. Their interests passed to those respondents who are descendants of the locators in the 1950's when they performed work on the claims, and by statutorily authorized publication and otherwise, called upon any successors in interest to McCann and Love to contribute their share of the expenses of the work, and they failed to do so. Finally, respondent Neil Mincer received an

interest in the claims from the other owners in return for legal services rendered.[6]

Assessment work was performed on the Compass claims each year from 1920 through the assessment work year which ended June 30, 1930.[7] Whether the work was done the next year was disputed and in the old contest it was decided that sufficient work had been done for one of the Compass claims but not for the other three.[8]

The Oyler (*Brown*) Claims and the Application To Patent Them

The patent application for the four Oyler claims was filed on September 30, 1955, also in the Colorado State Office. Pl. Ex. 250; R. 2267. Field investigation of these claims was then made by a veteran Mineral Examiner, Warren Sholes, who had also examined the claims in the latter 1920's and early 1930's when the Land Office was determining the validity of all oil shale claims (Pl. Ex. 125; A. 166). His February 12, 1957, report (Pl. Ex. 125; A. 166-174) on the Oyler patent application noted two technical defects (which were to be cured over the next few years, Pl. Exs. 255, 256; A. 259-260), and otherwise indicated that the claims were eligible for patent. He attached to this report his prior report (Pl. Ex. 242; R. 2213-52) of February 28, 1929, which had found the claims valid in all respects with the possible exception of assessment work. The 1929 report had itself referred to an earlier report (Pl. Ex. 229; A. 243-49) of still another investigation that had been made of the claims in 1918.

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[6] The abstract of title showing the devolution of ownership of the Compass claims appears in the Compass patent application, Def. Ex. D; R. 6610-6761, 882.

[7] The abstract of title, note 6 above, contains documents evidencing performance of the work through these years.

[8] Pl. Ex. 155; R. 1966-67. Service of process was not effected against locators McCann and Love or their successors in interest.

The 1918 report had been made in the course of investigation at that time of oil shale claims which, like the Oyler claims, were within the 1916 Naval Oil Shale Reserve and, because they antedated the establishment of the Reserve, would if valid reduce its size. This report indicated that a thorough investigation had been made, including interviews of the locators, and concluded that the claims were valid. The report also indicated that "it was well known that bona fide oil shale placer locations existed within the confines of this reserve at the time it was created. . . ." A. 247.[9]

Mineral Examiner Sholes' 1929 report noted that in 1920 the Oyler claims had been purchased by the Index Shale Oil Company (Pl. Ex. 242; R. 2219). Index was founded and controlled by Harry Brown, whose widow, respondent Penelope Chase Brown, still owns the Oyler claims.

The Browns were originally from New Jersey, where Harry Brown had a flourishing business. Around 1920 he was lured by the challenge of bringing the nation's vast oil shale reserves into commercial production, and over the next fifteen years he devoted all of his energies and financial resources, including the proceeds of a mortgage loan on the family residence in New Jersey, to the operations of Index. Index held two groups of oil shale claims, the four Oylers, and a group of seventeen other claims that came to be known as the "Index" claims. Index did not apply for patents on the claims [10] but concentrated its re-

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[9] Indeed, in establishing the Naval Oil Shale Reserves in 1916, more than twice the oil shale reserves the Navy had requested was set aside, "in order to safeguard against the reduction of the reserves through the existence of valid claims not of record in the Department of the Interior" (Pl. Ex. 222; R. 2126-29).

[10] The "Index" claims (Sulphur Spring, Mt. Blaine, *et al.*) were patented to a successor in interest in 1959 (Pl. Ex. 95; A. 152).

sources upon research and development. These activities led around 1923 to the opening of an oil shale mine and the construction of a production complex on the Index claims, which was operated until around 1928. Research continued for some years thereafter, and the Browns continued to live there on the claims until 1936. During these years Index resisted separate assessment work contests against the "Index" group of claims and the Oyler claims. *E.g.*, Pl. Ex. 40; A. 89.

Index performed assessment work on the Oyler claims for each year through June 30, 1930. As Mineral Examiner Sholes' 1929 report confirmed, more than $5,000 worth of work was done in the 1921-1928 assessment work years alone (Pl. Ex. 242; A. 251-252). It was arguable, however, whether in particular years $100 worth of work was properly allocable to each claim (Pl. Ex. 242; R. 2213, 2249-51), and in 1929 a complaint was filed (Contest 12039) charging that sufficient assessment work had not been done "each and every year since the date of the Leasing Act" (Pl. Ex. 244; R. 2255).[11] Before a hearing was held in Contest 12039 this Court announced its ruling in *Wilbur* v. *Krushnic*, 280 U.S. 306, and Interior decided that the 1929 charge would be "ineffective", and directed a further field examination (Pl. Exs. 37, 38; A. 86-88). The field investigation indicated that sufficient work had been done for the years 1929 and 1930, but not for the year ending June 30, 1931, and the Oyler claims were promptly attacked in a renewed complaint for that default (Pl. Exs. 40, 41; A. 88-91). Index, through Harry Brown, admitted that it had not performed sufficient assessment work on the Oylers in the year that ended June 30, 1931, but challenged the Land Office's jurisdiction in the premises (Pl. Exs. 40, 41; A. 88-91). This challenge the Commissioner in 1931 and the Secretary in

[11] The Oyler contest and claims thus are quite similar to the circumstances of the *Krushnic* case, as the Government's brief describes them (p. 14).

1932 rejected, declaring the claims invalid. *Ibid.* The Secretary later agreed in 1935, however, that the challenge to his jurisdiction had been well founded. At the conclusion of the assessment work contest against the Oyler claims, Under Secretary Charles West wrote to the Secretary of the Navy, on October 31, 1935, that the 1931 and 1932 declarations of invalidity were "without effect and void" (Pl. Exs. 176, 177; A. 195-197).

While the Navy Department and the Interior Department each was thus aware of the Oyler claims and of Index' defense and maintenance of them, and each understood the claims to have been unaffected by the 1931-1932 declarations of invalidity, they proceeded, toward the close of World War II and in the exigencies of a national emergency, to construct and operate an oil shale mine and demonstration plant a short distance from the Oyler claims, and to locate a water storage facility on one of the Oyler claims. While those operations were underway the officials involved were clearly advised by Index of its continuing rights in the Oyler claims (Pl. Ex. 248; A. 254-255). The operations were, however, completed without any interference on Index' part.

Rejection of the Patent Applications

Application for patent for the Oyler claims was, as noted, filed on September 30, 1955. While the technical defects in the patent application were being remedied, local officials of the Land Office raised with their superiors in Washington the possibility of utilizing the old assessment work decisions to defeat the Oyler claims, among others (Pl. Exs. 212-214; A. 237-38; R. 2099-2102). This possibility was unequivocally rejected in a December 3, 1959, memorandum by Associate Solicitor Clarence Bradshaw (a career official who had himself been active in the

old assessment work proceedings (see Pl. Ex. 283; R. 4581-82)), for the reason that in view of this Court's ruling in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, the Department had,

> "in its decision of June 24, 1935, in the *Shale Oil Company* case (55 I.D. 287) held that in that case the Commissioner's decision was without authority of law and void; . . . and overruled 'other departmental decisions in conflict with this decision'. Thus in effect the decision of June 24, 1935, recalled and vacated *all* departmental decisions declaring oil shale placer claims null and void solely for failure of the claim owner to do the assessment work, thus leaving the claims as if they never had been contested." (Pl. Ex. 215; A. 238-39; Emphasis in original, see R.2103)

Early in 1961 local officials processing the Oyler patent application concluded that patent should issue shortly, because apart from the technical defects being cured "all aspects concerning the validity of the subject claims have been complied with" (Pl. Ex. 255; A.259-260) and because "We have investigated the application as to abandonment, dummy locators, and lack of good faith, and find that there is no basis for rejecting the application on any of these grounds" (Pl. Ex. 254; A.258).

During the middle of 1961, however, inquiry was again directed to higher officials in Washington concerning the possibilities of rejecting pending oil shale patent applications by reason of the old assessment work decisions (Pl. Exs. 157, 217; A.193-194, 240-241). By telegram of September 22, 1961, a new Associate Solicitor (Clarence Bradshaw having retired) "authorized" local officials to reject pending applications on that ground wherever possible, cautioning them that "care should be exercised" to assure that the old contests had been procedurally proper so that the rejection of the patent applications "may be reasonably free from successful challenge" (Pl. Ex. 218; A.241).

By a decision dated February 16, 1962 (Def. Ex. B; A.266-268), local officials rejected the Oyler application referring to the old assessment work decision and to "the principles of finality of administrative action, estoppel by adjudication, and res judicata. . . ." The decision also announced falsely that "the contestee and its purported successors in interest have acquiesced in the Commissioner's decision for more than 29 years."

Virtually identical decisions[12] were rendered at the same time as to the Compass application, and as to all other pending oil shale patent applications wherever there had been a prior declaration of invalidity for default in performance of assessment work.

Prior to the February 16, 1962 decisions, the Department gave no notice, warning, or opportunity to be heard, to the oil shale patent applicants (Pl. Ex. 314; A. 311-312, Answer to Interrogatory 41). Those decisions recited that they would become final unless "appeals" were prosecuted within 30 days to the Director of the Bureau of Land Management.[13] Such appeals were duly perfected within the time allowed.

On appeal, the oil shale claim owners argued, among other things, that their claims could not properly be declared invalid in the absence of notice of the charges thought

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[12] Although these form decisions asserted generally that during the alleged acquiescence "the rights of others, including the United States, have intervened", the facts are that, because the Oyler claims are within the Naval Reserve, no part of them has ever been open for oil and gas leasing, for homesteading under the surface-homestead laws, or for any other public land law use, except for the granting of a succession of one-year grazing privileges.

[13] On May 8, 1962, the appeals were taken from the Director and assigned for decision to the Office of the Solicitor, which had "authorized" the decision being appealed. See A.352. The claim owners were not notified of this and thus continued to direct their papers on appeal to the Director.

to invalidate their claims, and in the absence of an opportunity to present evidence bearing upon those charges. They argued that such notice and opportunity to be heard were required by due process, the Administrative Procedure Act, and the Department's own regulations. Focusing upon these contentions, the oil shale claim owners filed, in the spring of 1963, similar motions for a remand of the proceedings to the local level so that a hearing could be held (Def. Ex. B; A. 263-266; Def. Ex. D; A. 315-326). To these motions were attached comprehensive offers of proof (*ibid.*) covering a variety of factual matters subsequent to the old assessment work decisions upon which the Department had purported to rule implicitly or expressly, in the February 1962 decisions—matters such as (1) whether in 1935 the Department had itself rendered all the prior assessment work decisions ineffective, (2) whether and to to what extent the Department had subsequently treated those decisions as ineffective, and (3) whether the Government or any private party had regarded those decisions as effective and had acted in reliance upon such a view.

In 1964 the Solicitor's Office rejected the motions for a hearing and the offers of proof and rejected the subject patent applications. A. 352-386. The present actions followed shortly.

SUMMARY OF ARGUMENT

The *Union Oil* proceedings of 1961-1964 purported to invalidate respondents' valuable property rights in oil shale mining claims. Starting from the premise that certain decisions in 1931-1932 (purporting to invalidate the claims for default in performance of annual assessment work) were legally erroneous, *Union Oil* reached its conclusion that the claims were invalid by several purported factual determinations as to events in the intervening period: determinations that the claim owners had acquiesced

in the 1931-1932 decisions throughout the intervening period, that the Government and private parties had throughout the period regarded the 1931-1932 decisions as effective and had extensively acted in reliance upon the supposed efficacy of the 1931-1932 decisions as having terminated the claims, that the persons who had so acted would now be prejudiced by any recognition that the 1931-1932 decisions were not effective, and that the claim owners were barred by laches and estoppel from obtaining relief from the concededly erroneous decisions of 1931-1932.

Before any such determinations could properly be made and the claims extinguished, the claim owners were entitled to notice of the charges concerning events during the intervening period, and an opportunity to present evidence and argument to an impartial adjudicatory tribunal. *Union Oil*, however, failed to afford notice or opportunity for a hearing, and failed to afford an impartial tribunal. This failure offended the due process clause, the Administrative Procedure Act, and Interior's own published regulations and decisions concerning adjudications of the validity of mining claims.

The attempted justification in *Union Oil* for denying notice and hearing—that notice and hearing had been afforded prior to the 1931-1932 decisions—has, of course, no logical application to events and charges subsequent to 1932. Quite apart from the substantive questions involved, *Union Oil* is vitiated by fundamental procedural defects, and cannot serve to invalidate respondents' claims.

As shown in the separate brief filed herein by the respondents in the *TOSCO* case, the 1931-1932 decisions are on several alternative grounds subject to reversal in an action for direct judicial review thereof. The respondents here have duly sought such direct review (A. 399, 409), distinct from their request that *Union Oil* be set aside. Accordingly, it is requested that the action of the lower courts

be affirmed, in which event Interior would resume the orderly processing of respondents' patent applications and could not treat the 1931-1932 decisions as presently effective.

ARGUMENT

I.

The *Union Oil* proceeding cannot sustain a decision in the Government's favor since it purported to invalidate valuable property rights on the basis of controverted propositions of fact and of law without affording notice and an opportunity for hearing, thereby offending Due Process, the Administrative Procedure Act, and Interior's own regulations.

When an application for patent for a mining claim is filed in the appropriate local land office, the applicable statutes and regulations, as well as administrative necessities, contemplate that the local officials will examine the application for completeness and formal sufficiency.[14] If the application is defective or incomplete it will be rejected, without prejudice to a new application in proper form, or the applicant will be required to correct or complete it.

The *Union Oil* proceedings, however, did not reject the subject patent applications for any such curable formal deficiency. On the contrary, the applications were rejected on the basis that the underlying mining claims were invalid.[15] And that finding, that the claims were invalid, did

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[14] The contents and filing procedures of patent applications are detailed at length in 30 U.S.C. 28, and 43 C.F.R. Parts 3450, 3470 (1969).

[15] Mining claims are of course property, "property in the fullest sense of that term." *Wilbur* v. *Krushnic,* 280 U.S. 306, 316. That the oil shale deposits within the subject mining claims are valuable is undisputable; indeed, that value provides most of the reason why the Government has gone, and is presently going, to such lengths to establish its proprietary rights thereto.

not rest upon the propriety or sufficiency of any prior adjudication.[16] Rather, *Union Oil* rested upon factual and legal determinations with respect to events subsequent to the "erroneous" adjudications.

Chief among these was the largely factual determination that the claim owners were guilty of laches and estoppel, involving subsidiary determinations that the United States and others had acted in reliance upon the supposed effectiveness of the assessment work decisions and would now be prejudiced, with respect to such actions, by any recognition that those decisions were not to be given effect. In addition, *Union Oil* rested upon the anticipatory rejection of some, but not all, factual propositions that were later to be advanced affirmatively by the claim owners in their offers of proof. For example, the February 1962 decisions made determinations with respect to several remedial administrative actions, rulings and decisions following this Court's ruling in *Virginia-Colorado*.[17] The Solicitor's Office itself acknowledged the presence of disputed factual elements in the *Union Oil* proceedings when, on May 20, 1963, it wrote to counsel for some of the oil shale claimants that their patent applications had been consolidated "with certain others involving identical questions of law and fact."

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[16] On the contrary, the 1964 *Union Oil* opinion conceded that the assessment work decisions against the claims were erroneous in light of this Court's *Virginia-Colorado* decision, and stated that the basic question was "the ultimate effect of an error of law." A. 367. *Union Oil* did reject the legal proposition that Interior lacked statutory authority with respect to assessment work questions.

[17] See, *e.g.*, A. 267. The 1964 *Union Oil* decision made similar determinations on those matters. A. 358-360. The oil shale claim owners contend that these events, and others, established that the Department itself rendered the assessment work decisions ineffective, and the owners introduced a number of documents and deposition testimony in this regard at the trial in the district court below.

It seems indisputable that the essence of an adjudication that satisfies due process is a reasonable opportunity to learn and rebut the arguments and contentions of one's adversary, the presentation of evidence and argument by both sides of a controversy, and a decision of that controversy that is based solely on the argument and evidence presented. As stated in *Morgan* v. *United States,* 304 U.S. 1, 18-19:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Accord, *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 338 ("Due process in such case [determination of the validity of a mining claim] implies notice and a hearing."); *Gonzales* v. *United States,* 348 U.S. 407, 414 ("The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions."); *Morgan* v. *United States,* 298 U.S. 468, 480 ("There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . The 'hearing' is the hearing of evidence and argument."); *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793, 799-800; *Ohio Bell Telephone Co.* v. *Public Util. Comm'n,* 301 US. 292; *Crowell* v. *Benson,* 285 U.S. 22, 47-48; *ICC* v. *Louisville & Nashville R.R.,* 227 U.S. 88, 93; Annotation, 99 L.Ed. 460.

The Administrative Procedure Act, an act framed to guard against excesses of administrative zeal and thought

by its draftsmen to impose procedural standards of fairness that exceeded the Constitutional minimums, see *United States* v *Morton Salt Co.*, 338 U.S. 632, 644, also requires, among other things, notice and an opportunity to be heard where the validity of a mining claim is at issue. *E.g.*, *Adams* v. *Witmer*, 271 F.2d 29 (9th Cir. 1958).

Interior's own regulations specifically require that notice of charges and an opportunity to be heard be afforded. *Contest and Protest Proceedings*, 43 C.F.R. Subpart 1852 (1969) (regulations similar in all material respects have been in effect at all relevant times). Interior's published decisions acknowledge that contest proceedings are required to determine the validity of a mining claim. *E.g.*, *United States* v. *O'Leary*, 63 I.D. 341, 345 (1956). Indeed, at the outset of the *Union Oil* proceedings in 1961, the Denver Regional Office of the Solicitor recognized this and so advised the Solicitor's Office. Pl. Ex. 217; A. 240-241.

The February 1962 decisions which rejected the patent applications gave no express reasons for affording neither notice nor opportunity to be heard. As noted at page 9 above, the local officials had been specifically "authorized" by officials in Washington simply to reject the applications, and they did so. The 1964 decision by the Office of the Solicitor, however, stated in effect that notice and an opportunity to be heard need not be given because notice and an opportunity to be heard had been afforded over thirty years before in the assessment work contests themselves. A. 356-358. That notice and opportunity pertained of course only to the matter then alleged, that in or prior to 1931 there had been a default in performance of assessment work. However, that default was not the reason given in *Union Oil* for holding the oil shale claims invalid. Rather, the disputed but vital matters of fact which the 1964 decision purported to determine all occurred subsequent to 1931, matters such as (1) alleged laches and estoppel of the oil shale claim owners up to 1964, (2) supposed

acquiescence by the claim owners, (3) reliance by the Government and private parties on the assessment work decisions throughout the period, and (4) remedial administrative action by Interior in 1935 to apply this Court's decision in *Virginia-Colorado*. *Union Oil's ex parte* decision of these post-1931 factual matters was vital to its conclusion to cancel the claims. Since the matters as to which *Union Oil* denied notice and a hearing were not, and indeed could not have been, covered by the 1931 proceedings, those old proceedings do not warrant that denial. It follows then that *Union Oil* cannot now be affirmed.[18]

The Government's brief does not contend that *Union Oil* was procedurally proper; indeed, the brief scarcely mentions the *Union Oil* proceedings, and endeavors at length to establish the proposition that the old assessment work decisions were rightly decided, a proposition contrary to the recognition in *Union Oil*[19] that they were erroneously

[18] The procedural impropriety of *Union Oil* was compounded by the fact that the Office of the Solicitor not only "authorized" the rejection of the patent applications, ignoring as it did so the Regional Solicitor's indication that the contest procedures calling for notice and hearing should be followed, but also supplied such ammunition of fact and law as was fired against the oil shale claims, as the 1964 opinion in *Union Oil* itself makes clear. No hearing preceded the 1964 opinion; no evidence was offered, no adversary of the oil shale claim owners even participated openly in the "appeals", no brief was filed, no argument made, for the claim owners to rebut. Only the Solicitor's office then could have originated the matters of fact and law asserted in the lengthy 1964 opinion. This combination of prosecutorial and decisional functions ran afoul of established and basic notions of administrative fairness. *E.g., Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *Columbia Research Corp.* v. *Schaffer*, 256 F.2d 677 (2d Cir. 1958) *vacated on other grounds*, 256 F.2d at 680-681; *TransWorld Airlines* v. *CAB*, 254 F.2d 90, 91 (D.C. Cir. 1958); 2 Davis, *Administrative Law* 236, n.2 (1958).

[19] A. 367 ("we have only to determine the ultimate effect of an error of law . . .")

decided. *Cf. Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94. Its Petition for Certiorari suggests (pp. 6, 9n.4, 13) however that the Government does take the view that *Union Oil* properly ruled on the factual questions discussed above, thereby necessitating the foregoing discussion.

II.

The proceedings in the lower courts provide adequate and appropriate bases for a ruling in the oil shale claimants' favor.

As noted at the outset of this brief, the separate brief being filed on behalf of the respondents in the *TOSCO* case presents alternative arguments common to all four cases warranting a ruling here in favor of the oil shale claim owners. In the interests of brevity those arguments are incorporated by reference and will not be repeated here.

It may bear repeating however that the present cases seek, quite apart from review of *Union Oil*, direct judicial review of the 1931-1932 assessment work decisions themselves (which is all that is sought in the *TOSCO* case). This relief was specifically requested in the oil shale claim owners' complaints. By its answers in the District Court opposing such relief the Government placed in issue factual matters of affirmative defense, specifically asserting laches and estoppel.[20]

After extensive pre-trial discovery conducted by the Government as well as by the claim owners, a full record was compiled at trial. The evidence received at the trial included more than 2,700 pages of documents offered by

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[20] *E.g.*, A. 423.

the Government.[21] The claim owners likewise put in substantial amounts of evidence, comprised entirely of documents in or from Interior's files, answers to interrogatories, or depositions of Government employees. This record is more than adequate, and is entirely appropriate,[22] for decision of the contentions that are set out in the respondents' brief in the *TOSCO* case.

On the other hand, a brief comparison of the trial record with the purported factual determinations in *Union Oil* will make clear the impossibility of treating that as an adequate adjudication. For example, the *Union Oil* proceedings purported to find that the claim owners had "acquiesced" in the old decisions (A. 267, 363, 369), but Judge Doyle found after trial that "there is a dearth of evidence to establish acquiescence, express or implied. . . ." (A. 47)

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[21] The Clerk of the District Court separately paginated 2,772 pages of the Government's evidence. He did not paginate a number of the Government's documents as "not suitable for reproduction."

[22] The implications in the Government's Reply to the Brief in Opposition to the grant of certiorari (pp. 2-3) that there was a "record" made in *Union Oil*, and that that record was appropriate for the findings *Union Oil* made, are insupportable. The Reply's disparagement of "the record sought to be made in the district court" (pp. 2-3) and its argument that the courts may not themselves decide whether the affirmative defense of laches has been sustained (p. 3 n. 1), may be understandable in that the district court was the only forum in which an evidentiary record was made, that record was quite full, and that record not only showed that there was no evidence of laches but affirmatively disproved laches. Of course the Secretary as defendant is not to be the judge of his own affirmative defense, whether laches or estoppel, for that would preclude judicial review of the old assessment work decisions; the courts themselves decide whether resort to them has been timely. *E.g., Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206; *Costello* v. *United States*, 365 U.S. 265; *Gardner* v. *Panama R. Co.*, 342 U.S. 29; *Holmberg* v. *Armbrecht, et al.*, 327 U.S. 392; *Powell* v. *Zuckert*, 366 F.2d 634 (D.C. Cir. 1966); *Kosty* v. *Lewis*, 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964.

and indeed the Government has not even contested that finding in its subsequent appeals.

Similarly, *Union Oil* purported to find that the United States and others had relied upon the supposed effectiveness of the old assessment work decisions and that the claim owners were guilty of laches and estoppel. A. 368, 370-373. But during the pre-trial discovery proceedings (A. 305-312) and in its post-trial brief (pp. 59-60), the Government conceded that there was no evidence whatsoever of any such reliance.[23] The concession was hardly gratuitous; the trial record was replete with documentary evidence showing that the Government had regarded the assessment work decisions as void. *E.g.*, Pl. Ex. 176; A. 195-196 (Interior letter in 1935 to the Secretary of the Navy stating that the assessment work decision against the Oyler claims was "without effect and void.")[24]

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[23] The Petition for Certiorari, however, reasserts such reliance (p. 11), but of course cites no evidence. The same passage recurs in the Government's brief on the merits (pp. 42-43), but with the significant omission of the phrase "in reliance on the cancellations."

[24] For a third and more specific example, we note that the Lucy Agnes claims 1 and 2 were among those (see Supplemental Decision, 72 I.D. 313 (1965)) as to which *Union Oil* found "acquiescence" for 30 years on the part of the claim owners, and reliance by the Government on the assessment work decision. *Union Oil* also criticized the claim owners for not seeking judicial relief "within a reasonable time" after this Court's ruling in *Virginia-Colorado* in 1935. A. 368. The record at trial showed, however, that within the following year the owners of the Lucy Agnes claims had inquired of the General Land Office as to the prior assessment work decisions, noting that the *Virginia-Colorado* ruling had "seemingly set at naught all of these former challenges." Pl. Ex. 181; A. 200. The Commissioner of the General Land Office responded that "this office considers it would be unnecessary to revoke its previous decision holding the Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the

CONCLUSION

The principal thrust of this brief has been a negative one—that the *Union Oil* proceedings were riddled with substantial procedural defects. This brief has been necessitated by the Government's occasional intimations that it contends that *Union Oil* was both procedurally and substantively proper. Respondents trust however that it will prove unnecessary for this Court or a lower court to rule upon these contentions. As demonstrated in the separate brief, incorporated by reference herein, filed on behalf of The Oil Shale Corporation, there are several alternative grounds upon which a suit for direct judicial review of the old assessment work decisions should prevail. These are such suits. Respondents are confident that, upon prevailing in their direct challenge of the 1931-1932 decisions, they will as a practical matter no longer be faced with *Union Oil* as a barrier to the orderly processing of their patent applications, applications which have now been

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title arising from the location of the claims." Pl. Ex. 180; A. 199-200. *Union Oil's* findings of acquiescence, laches and estoppel on the part of the owners of the Lucy Agnes claims 1 and 2, and of reliance by the United States and others upon the supposed effectiveness of the assessment work decision against the claims, is all the more startling in view of the fact that the two letters quoted were among six documents that were appended to the oil shale claimants' briefs in *Union Oil* calling Interior's attention to what its long practice had actually been and illustrative of evidence that could be produced at a hearing. A. 370, 380-382.

pending for 11 and 15 years, respectively. The decision below should be affirmed.

Respectfully submitted,

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INDEX

PAGE

Statute and Regulations Involved 1

Statement 2

The Legislative Setting of the Assessment Work Controversy 5

The Development and Course of the Oil Shale Assessment Work Controversy 19

Interior's Response to the *Virginia-Colorado* Decision 30

1. Dismissal of Pending Cases 32

2. Reflection of the *Shale Oil* Decision in Interior Correspondence 34

3. The Void Character of Assessment Work Decisions Shown by the Knowing Issuance of Patents for Claims Declared Invalid on that Ground 40

Interior's Change of Position 46

Summary of Argument 49

ARGUMENT 54

I. The 1928-1931 assessment work decisions were final administrative decisions which are now properly before the Court on direct review, for the asserted defense of laches has in substance been abandoned and is, in any event, wholly unsupported in the extensive record; the unanimous decisions of this Court in *Krushnic* and *Virginia-Colorado* twice set aside similar administrative decisions and correctly held that non-performance of annual assessment work on oil shale claims did not forfeit the claims to the United States 54

INDEX

PAGE

A. The 1928-1931 decisions were administratively final decisions subject to direct judicial review when rendered, and they remain subject to such direct review, for the pleaded defense of laches is without support and has in substance been abandoned 56

B. In its decisions in *Krushnic* and *Virginia-Colorado* this Court twice rejected the arguments now urged by the Government and set aside assessment work decisions indistinguishable from the 1928-1931 decisions here 63

C. The mining statutes and the Mineral Leasing Act cannot properly be construed to permit the Government to terminate a mining claim for default in assessment work.... 70

(i) Under the mining law the Government had no general interest in the performance of assessment work 71

(ii) Contrary to the Government's contenhere, there was and is no well established exception giving the Government an interest in the performance of assessment work where there is a subsequent withdrawal of the land 76

(iii) The text, the context and the legislative history of the Mineral Leasing Act clearly refute the contention that the performance of assessment work was thereafter required upon pain of forfeiture of the claim to the United States 83

II. The District Court and the Court of Appeals rightly held that the department lacked subject matter jurisdiction to render the 1928-1931 assessment work decisions against the claims in suit 94

PAGE

A. The *Virginia-Colorado* decision was a ruling on the Department's subject matter jurisdiction 95

B. The Department's power to inquire extends wherever it has a duty to act; having no duty to act with respect to the performance of assessment work, it had no power to inquire into it 103

III. To overrule *Krushnic* and *Virginia-Colorado* would do violence to thirty years of legislative reliance on the soundness of the decision, would intrude upon the comprehensive consideration of the land laws now being given by the Public Land Law Review Commission, and would meet no need, for a continued recognition of the ineffectiveness of the assessment work decisions imposes no burdens on Public Land Administration 108

A. Repeated efforts to overturn through legislation the statutory construction announced in the *Krushnic* and *Virginia-Colorado* decisions have failed of enactment; and a judicial overthrow of that doctrine would impinge upon pending Congressional review of public land legislation 109

B. The administrative practice for a quarter-century has wholly relied upon the established construction of the statutes and there are no competing uses reflecting any different view; overruling the established construction would serve no purpose on any theory for the assessment work decisions were in any event largely ineffective for procedural reasons 113

Conclusion 121

CITATIONS

Cases:

	PAGE
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	113
Becker Steel Co. of America v. *Cummings*, 296 U. S. 74	98
Best v. *Humboldt Placer Mining Co.*, 371 U. S. 334	78, 81, 95, 97, 105
Bishop of Nesqually v. *Gibbon*, 158 U. S. 155	106
Blau v. *Lehman*, 368 U. S. 403	113
Brownlow v. *Schwartz*, 261 U. S. 216	62
Buckstaff Co. v. *McKinley*, 308 U. S. 358	98
Bunker Chance Mining Co. v. *Bex*, 408 P. 2d 170 (Idaho 1965)	97
Cameron v. *United States*, 252 U. S. 450	15, 16, 52, 81, 95, 97, 100, 104, 105, 114
Chicot County Drainage District v. *Baxter State Bank*, 308 U. S. 371	114
Continental Illinois Nat. Bank & Trust Co. v. *Chicago, R. I., & Pac. Ry.*, 294 U. S. 648	99
Costello v. *United States*, 365 U. S. 265	60
Detroit Trust Co. v. *The Thomas Barlum*, 293 U. S. 21	99
Elder v. *Horseshoe Mining & Milling Co.*, 194 U. S. 248	8
Erhardt v. *Boaro*, 113 U. S. 527	6, 72
Erie R.R. v. *Tompkins*, 304 U. S. 64	53, 112
Gabbs Exploration Co., v. *Udall*, 315 F. 2d 37 (D. C. Cir.), *cert. denied*, 375 U. S. 822 (1963)	21
Gutierrez v. *Waterman Steamship Corp.*, 373 U. S. 206	60
Helvering v. *Gowran*, 302 U. S. 238	56
Hodgson v. *Midwest Oil Co.*, 17 F. 2d 71 (8th Cir. 1927)	82

PAGE

Humphrey's Executor v. *United States*, 295 U. S. 602 99

Ickes v. *Virginia-Colorado Development Corp.*, 295 U. S. 639 .....3, 16, 26, 29, 40, 50, 54, 56, 63, 64, 66, 83, 94, 97, 100, 103-105, 108, 113

Ickes v. *Virginia-Colorado Development Corp.*, 69 F. 2d 123 (D. C. Cir. 1934), *aff'd* 295 U. S. 639 29

Iron Silver Mining Co. v. *Campbell*, 135 U. S. 286 .....11-12, 72

Jackson v. *Roby*, 109 U. S. 440 5

Jennison v. *Kirk*, 98 U. S. 453 5

Kalb v. *Feuerstein*, 308 U. S. 433 98-99

Leonard v. *Lennox*, 181 Fed. 760 (8th Cir. 1910) 9

Lowndale v. *Parrish*, 21 How. 290 ..... 6, 71

Michigan Land & Lumber Co. v. *Rust*, 168 U. S. 589 106

Missouri v. *Ross*, 299 U. S. 72 113

Morrissey v. *Commissioner*, 296 U. S. 344 98

Nat. Licorice Co. v. *Labor Board*, 309 U. S. 350 99

Nierbo Co. v. *Bethlehem Corp.*, 308 U. S. 165 98

Norman v. *Baltimore & Ohio R.R.*, 294 U. S. 240 99

Northern Pac. Ry. v. *Boyd*, 228 U. S. 482 60

Nortz v. *United States*, 294 U. S. 317 99

Payne v. *Central Pac. Ry.*, 255 U. S. 228 104

Perry v. *United States*, 294 U. S. 330 99

Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316 106

Russian-American Co. v. *United States*, 199 U. S. 570 ..... 9, 84

Shoshone Mining Co. v. *Rutler*, 177 U. S. 505 ..... 7, 71

Smelting Co. v. *Kemp*, 104 U. S. 636 5

Taylor v. *Sternberg*, 293 U. S. 470 98

Thatcher v. *Brown*, 190 Fed. 709 (9th Cir. 1911) 86

PAGE

Union Oil Co. v. *Smith*, 249 U. S. 337 ..... 84, 89

United States v. *American Ry. Exp. Co.*, 265 U. S. 425 56

United States v. *Baltimore & Ohio R.R.*, 293 U. S. 454 99

United States v. *Borden Co.*, 308 U. S. 188 86

United States v. *Chicago, M., St. P. & Pac. R. Co.*, 294 U. S 499 99

United States v *Etcheverry*, 230 F. 2d 193 (10th Cir. 1956) 111

United States v. *Schurz*, 102 U. S. 378 ..... 100, 105-106

United States ex rel. Chicago Great Western R. R. v. *ICC*, 294 U. S. 50 98

United States ex rel. Krushnic v. *West*, 30 F. 2d 742 (D.C. Cir. 1929) 82

United States ex rel. McLennan v. *Wilbur*, 283 U. S. 414 10

Van Sice v. *Ibex Mining Co.*, 173 Fed. 895 (8th Cir. 1909) 8

Walling v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17 113

West v. *Standard Oil Co.*, 278 U. S. 200 ..... 58, 104

Wilbur v. *Krushnic*, 280 U. S. 306 ..... 3, 10, 24, 50, 54, 56, 64, 82, 83, 96, 108, 113

Interior Decisions:

Alice Placer Mine, 4 L.D. 314 (1886) 12

Arid Land, 32 L.D. 387 (1904) 81, 87

Arnold Wink, 31 L.D. 47 (1901) 87

Aurora Lode v. *Bulger Hill and Nugget Gulch Placer*, 23 L.D. 95 (1896) 12

Branagan v. *Dulaney*, 2 L.D. 744 (1884) 12

The Clipper Min. Co. v. *The Eli Min. & Land Co.*, 34 L.D. 401 (1906) 9

PAGE

Cronberg v. *Hazlett*, 51 L.D. 101 (1925) 66, 67, 82

David W. Harper, 74 I.D. 141 (1967) 8

E. C. Kinney, 44 L.D. 580 (1916) 67, 68, 81, 82

Emil L. Krushnic, 52 L.D. 282 (1927), *On Rehearing*, 52 L.D. 295 (1928) 22-24, 51, 64-66, 69, 75, 82, 100

Federal Shale Oil Co., 53 I.D. 213 (1930) 103

Fort Maginnis, 1 L.D. 552 (1881) 77-79

Gorda Gold Mining Co. v. *Bauman, On Petition*, 52 L.D. 519 (1928) 75

Hattie E. Bradley, 34 L.D. 191 (1905) 87

Interstate Oil Corporation and Frank O. Chittenden, 50 L.D. 262 (1925) 66, 68, 82

James Morris, 47 L.D. 326 (1920) 88

Joshua L. Smith, 31 L.D. 57 (1901) 87-88

Joseph W. White, 33 L.D. 285 (1904) 87

Lizzie Trask, 39 L.D. 279 (1910) 88

M. Edith Curtis, 33 L.D. 265 (1904) 87

Nielson v. *Champagne Mining & Milling Co.*, 29 L.D. 491 (1900) 13, 73

Navajo Indian Reservation, 30 L.D. 515 (1901) .. 79, 82, 85

Oscar O. Reeg, 40 L.D. 206 (1911) 9

P. Wolenberg, 29 L.D. 302 (1899) 13, 73

The Shale Oil Company, 55 I.D. 287 (1935) 30-32, 34, 40, 51, 61, 62

Standard Shales Products Co., 52 L.D. 522 (1928) 66, 82

United States v. *Ruddock et al.*, 52 L.D.313 (1927) 66, 82

Union Oil Co., 23 L.D. 222 (1896), *On Review*, 25 L.D. 351 (1897) 14

Union Oil Co. of California, 71 I.D. 169 (1964) 3, 47, 111, 118

Union Oil Co. of California, Supplemental Decision, 72 I.D. 313 (1965) 72, 118, 119

Page

Virginia-Colorado Development Corporation, 53 I.D. 666 (1932) 28

William Breeding, 31 L.D. 80 (1901) 87

Winfred S. Schmitz, 38 L.D. 587 (1910) 88

Yosemite National Park, 25 L.D. 48 (1897) 78, 80, 81, 84

Statutes:

Act of March 3, 1843, 5 Stat. 620 87

Act of June 2, 1862, 12 Stat. 413 87

Act of May 14, 1880, 21 Stat. 141 87

Act of March 2, 1907, 34 Stat. 1243 ..... 15, 86

Act of January 11, 1915, 38 Stat. 792 ..... 15, 86

Act of July 20, 1956, 70 Stat. 592, 30 U.S.C. 122 ... 111

Act of September 2, 1958, 72 Stat. 1701, 43 U.S.C.A. 28-1, 28-2 111

Act of September 19, 1964, 78 Stat. 982, 43 U.S.C.A. 1392-1394 111-112

General Mining Law, May 10, 1872, 17 Stat. 91 ..... 7, 8, 71

30 U.S.C. 22 9

30 U.S.C. 28 ..... 8, 71, 72, 89

30 U.S.C. 29 ..... 8, 11, 72

30 U.S.C. 30 ..... 11, 72

Homestead Act, May 20, 1862, 12 Stat. 392, 43 U.S.C. 161-235 9

Mandamus and Venue Act of 1962, 76 Stat. 744, 28 U.S.C. 1361, 1391(e) (1964) 120

Mining Act of 1866, 14 Stat. 251 ..... 7, 71

Mineral Leasing Act of 1920, 41 Stat. 437 ..... 7, 8, 71

PAGE

30 U.S.C. 181 83

30 U.C.C. 193 ..... 14, 20, 83, 85

30 U.S.C. 227, 228 92

Multiple Mineral Development Act of 1954, 68 Stat. 708, 30 U.S.C. 521-531 14

Pickett Act, June 25, 1910, 36 Stat. 847, 43 U.S.C. 143 ..... 66, 67, 88

Placer Act of 1870, 16 Stat. 217 ..... 7, 71

Taylor Grazing Act, 48 Stat. 1269, 43 U.S.C. 315 116

13 Stat. 440 71

29 Stat. 526 14

Interior Regulations and Instructions:

Challenges to Validity of Mining Claims in National Parks, 53 I.D. 491 (1931) 13, 75

Circular 460, *Proceedings Upon Reports of Special Agents,* 44 L.D. 572 (1919) 58

Instructions, 47 L.D. 548 (1920) 20, 21

Instructions, Government Proceedings Against Oil Shale Claims for Default in Assessment Work, 53 I.D. 131 (1930) 58

Proceedings Against Mining Claims Within the Area of the Boulder Dam Project, Instructions, 53 I.D. 228 (1930) 13, 75, 82

Regulations, 37 L. D. 757 (1909) 2, 13, 73

Regulations, 49 L.D. 58 (1922) 2, 13, 73

Rules of Practice, 51 L.D. 547 (1926) 58

Rule 49, 51 L.D. 556 58

Rule 75, 51 L.D. 560 58

43 C.F.R. 1813.1-1(b) 44

43 C.F.R. 3420.4 ..... 13, 73

43 C.F.R. 221.49 (1949) 58

PAGE

43 C.F.R. 221.75 (1949) 58

43 C.F.R. 69.3 (1963) 86

33 Fed. Reg. 16154 18

33 Fed. Reg. 16156 18

Miscellaneous:

2 American Law of Mining 7.30-7.33 97

Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 Harv. L. Rev. 308 (1967) 120

59 Cong. Rec. 2709 93

59 Cong. Rec. 2711-12 ..... 15, 93

Consolidated Hearings before the House Committee on Public Lands on H. R. 3754, H. R. 12802, H. R. 13191, H. R. 15002, H. R. 15130, H. R. 15131 and H. R. 15132, "Applications for Patent on Oil-Shale Lands," 71st Cong., 2d and 3d Sess. (1930-31) 110

Executive Order 5327 (April 15, 1930) 116

Executive Order 6016 (February 6, 1933) 116

Gavin, *Oil-Shale, An Historical, Technical and Economic Study,* United States Bureau of Mines Bulletin 210 (1922) 17

Hearings before the Senate Committee on Public Lands on H. R. 406, "Leasing of Oil Lands," 64th Cong., 1st Sess. (1916) 90

Hearings before the Senate Committee on Public Lands on S. 45, "Leasing of Oil Lands," 65th Cong., 1st Sess. (1917) 91

Hearings before the House Committee on Public Lands on H.R. 3232 and S. 2812, "Oil Leasing Lands," 65th Cong. 2d Sess. (1918) 91-92

Hearings Pursuant to S. Res. 241 (76th Cong.) before a Subcommittee of the Senate Committee on Public Lands and Surveys, 77th Cong., 2d Sess. (1942-1943) .....

PAGE

Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, "Competitive Aspects of Oil Shale Development" (April and May 1967) 4, 19

H. R. 894 (89th Cong., 1st Sess.) 111

H. R. Report No. 939 (76th Cong., 1st Sess.) 110

H. R. Report No. 2198 (84th Cong., 2d Sess.) 111

History of Public Land Development (Govt. Print. Off. 1968) 112

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In The

Supreme Court of the United States

OCTOBER TERM, 1969

No. 221

Walter J. Hickel, Secretary of the Interior,
Petitioner,

v.

The Oil Shale Corporation and Energy Resources Technology Land, Inc.,
Respondents.

BRIEF FOR THE RESPONDENTS

Statutes and Regulations Involved

Although the petitioner's brief to this Court contains this caption it omits, as did the petition for certiorari, the relevant provision of the Regulations of the Department of the Interior. Section 3420.4 of Title 43, C.F.R. (1969), which was set forth in the respondents' brief in opposition to the petition (p. 4), provides as follows:

> "The annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes (30 U.S.C. 28), is, with the exception of certain phosphate placer locations, validated by the act of January 11, 1915 (38 Stat. 792; 30 U.S.C. 131), under which regulations were issued March 31, 1915 (Circ. 396), 44 L.D. 46, solely a matter between rival or adverse claimants

> to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."

This regulation has long been in effect. See, *e.g.*, *Regulations*, 37 L. D. 757, 769 (1909); *Regulations*, 49 L. D. 58, 73 (1922).

Statement

This brief is filed on behalf of The Oil Shale Corporation and Energy Resources Technology Land, Inc., who were the plaintiffs in the first to be commenced of the four cases now before this Court.[1] The respondents are the owners of 75 oil shale placer mining claims which were located under the mining laws, prior to the enactment of the Mineral Leasing Act of 1920, in Rio Blanco County, Colorado.[2] The present controversy concerning these claims stems from administrative proceedings between 1928 and 1931 in the Department of the Interior

1. This case was No. 8680 in the District Court and No. 9581 in the Court of Appeals. The other three cases are *Hickel* v. *Umpleby, et al.* (No. 8685 in the District Court and No. 9582 in the Court of Appeals); *Hickel* v. *Napier, et al.* (No. 8691 in the District Court and No. 9583 in the Court of Appeals); and *Hickel* v. *Brown, et al.* (No. 9202 in the District Court and No. 9584 in the Court of Appeals). Separate briefs are being filed in this Court on behalf of the *Umpleby* respondents and, jointly, by the respondents in *Napier* and *Brown*.

2. The Bute claims Nos. 1-19, 21-28 and 30-48; the Camp Bird claims Nos. 1-20; and the Atlas claims Nos. 1-3, 7, 9, 10, 12, 17 and 18. The location certificates showing the dates of location appear in the record (hereinafter cited as "R.") at pp. 2282-2324. Counsel for the Government conceded in the District Court that the respondents have record title (App. 54-55).

References to "App." or to "A." are to the Appendix in this Court, which includes not only portions of the record in this case (pp. 5-341) but also portions of the separate records in *Umpleby* (pp. 342-392), *Napier* (pp. 392-408) and *Brown* (pp. 408-433). By agreement of the parties the evidence common to the four cases was included in the record in this case.

in Contests 11757, 11759 and 11761 which culminated in decisions purporting to declare the claims, or interests in the claims, invalid solely for failure to perform so-called annual assessment work on the claims.

After the administrative decisions in the contests and after two unanimous decisions by this Court on the precise question involved had held that the Department had neither procedural power nor substantive authority to invalidate oil shale claims for failure to perform annual assessment work,[3] the Department in 1935 issued a ruling and various implementing directives which had the consequence of depriving of effect the decisions rendered in these contests and other similar administrative proceedings. Following its action in 1935 the Department thereafter consistently applied the administrative policy that the assessment work contest decisions of the kind rendered against the claims in controversy were themselves nullities.

In April 1964, however, in an administrative *volte face,* the Department announced in its decision in *Union Oil Company of California,* 71 I. D. 169, involving different oil shale claims, that the earlier assessment work decisions had become effective adjudications of invalidity of oil shale claims. As a consequence, the respondents promptly commenced this action in the District Court for direct judicial review of and relief from the 1928-1931 decisions, which it was only then for the first time necessary to obtain. No application for a patent has been filed for any of these claims, and the requested relief in this action does not include a prayer that the Secretary be required to issue patent. The relief sought in the complaint (App. 14-15), and granted by the District Court (App. 48-51), was con-

3. *Wilbur* v. *Krushnic,* 280 U. S. 306; *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U. S. 639.

fined to a prayer that the former decisions be expunged and that the Secretary be enjoined from asserting their validity.

The Oil Shale Corporation, which was incorporated in 1955, acquired in 1963 and presently holds a mining lease to the claims in suit and an option to purchase them.[4] In the first decade of its existence the Corporation spent several millions of dollars in the contruction of oil shale mines, retorts and related facilities and in the pursuit of research and development, in pursuance of a plan for the commercial production of shale oil.[5] These efforts have resulted, among other things, in the development of a method for the retorting of oil shale which, as the Department's most recent publication on oil shale explicitly concedes, has been "developed to the point of possible commercial application"[6] and in extensive testing of mining technology.[7] In 1968 the Corporation bid for an oil shale lease offered by the Department, which contemplated operations on a scale which would have provided an annual royalty to the Government of $5.25 million. This bid was rejected.

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4. Except as to the Bute claims Nos. 30-48. The Oil Shale Corporation purchased those claims in July 1964 by exercise of an option to do so itself acquired in June 1963.

5. See the testimony of Morton M. Winston, Vice President of The Oil Shale Corporation, "Competitive Aspects of Oil Shale Development", Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, Part 1 (April and May 1967), pp. 308-346.

6. "Prospects for Oil Shale Development", Dept. Int. (Govt. Print. Off., 1968), pp. 45-47. The "conventional" or surface oil shale process consists of the successive steps of *mining* the shale, *crushing* the mined rock to the appropriate size, *retorting* the crushed shale in a closed vessel at high temperatures to produce crude shale oil, and *refining* the crude shale oil into finished products.

7. "Mining technology has been tested extensively by both the Bureau of Mines and Tosco, for outcrop deposits of from 50 to 70 feet of oil shale beneath several hundred feet of overburden." *Id.*, p. 62.

The Legislative Setting of the Assessment Work Controversy

The legislative history of any mining claim question begins long before there was any federal mining legislation. In 1848 gold was discovered on Federal land in the California Territory; on December 5 of that year President Polk proclaimed to Congress "The accounts of the abundance of gold in that territory are of such an extraordinary character as would scarcely command belief . . . ."[8]; the great Gold Rush of 1849 resulted. The Forty-Niners were actually trespassers, for virtually all western lands were Federal lands yet there was no Federal mining legislation. The mineral prospectors remained trespassers until 1865, when the first Federal mining legislation applicable generally to the public domain was enacted.

The trespassing prospectors and miners evolved by practice and enforced by vigilante measures customs that became the essential content of Federal legislation, that the Congress ratified and adopted.[9] Since none of these adventurers then had or could obtain legal title to any

8. Swenson, "Legal Aspects of Mineral Resources Exploitation", Chapter XXIII (pp. 699-764) of HISTORY OF PUBLIC LAND LAW DEVELOPMENT (written for the Public Land Law Review Commission) 708 (Govt. Print. Off. 1968) hereinafter cited for brevity as "Swenson".

9. The miners "were emphatically the law-makers, as respects mining, upon the public lands" (*Jennison* v. *Kirk*, 98 U. S. 453, 457), and the Federal mining statutes gave to the regulatory pattern the miners had developed the "sanction of Law" (*Jackson* v. *Roby*, 109 U. S. 440, 441-442). As this Court explained in *Smelting Co.* v. *Kemp*, 104 U. S. 636, 650:

> "The rules and regulations originally established in California have in their general features been adopted throughout all the mining regions of the United States. They were so wisely framed and were so just and fair in their operation that they have not to any great extent been interfered with by legislation, either state or national."

public domain land, they had to develop standards to create and protect rights to the possession and enjoyment of any given tract of land; indeed, their customs came to be known as the Law of Possession. The creation of rights of possession was based upon priority of appropriation; the rights of the first to discover minerals and stake a claim were those to be protected.

The miners also found it expedient to formulate objective standards for determining the circumstances under which a prior appropriator could be dispossessed by a later one, and those customary standards became curiously specific.[10] In general, these standards provided that the later appropriator could obtain possession and enjoyment if the prior appropriator failed to perform a specified amount of work on his claim within a specified period.[11]

Early during the trespass period the miners' regulations came to be sanctioned by local legislation and enforced in local tribunals. See, *e.g.*, *Erhardt* v. *Boaro*, 113 U. S. 527, 535. Appeals in such cases apparently could not then be carried to this Court, in view of the ruling in *Lownsdale* v. *Parrish*, 21 How. 290, that ownership of land by the United States undermined any jurisdictional basis for this

10. The miners' customs included "provisions relating to . . . the amount of work required to hold the land from others who were only too eager to cry 'abandonment'. . . ." Swenson, at p. 709. Mark Twain writes of a bonanza he, a friend Higbie, and another located but lost, each thinking the others would do the work within the locally applicable ten days period, "At midnight of this woeful tenth day, the ledge would be 'relocatable', and by eleven o'clock the hill was black with men prepared to do the relocating. That was the crowd I had seen when I fancied a new 'strike' had been made—idiot that I was. . . . As midnight was announced, fourteen men, duly armed and ready to back their proceedings, put up their 'notice' and proclaimed their ownership. . . ." *Roughing It*, Chapter XLI, at p. 219 (Signet Classic Ed., New York, 1962). Twain dedicated *Roughing It* "To Calvin H. Higbie . . . In Memory of the Curious Time When We Two Were Millionaires for Ten Days." *Id.* at v.

11. See, *e.g.*, Swenson, at p. 713.

Court to adjudicate a dispute over possession between two private parties.[12]

The first legislation Congress passed on mining matters had as its purpose making the Federal courts available to adjudicate such disputes in accordance with the Law of Possession. See, *e.g.*, *Swenson*, at p. 717. This 1865 act, 13 Stat. 440, provided that no possessory action in any Federal court for the recovery of any mining "title" would be affected by the fact that the land was owned by the United States, and mandated that "each case shall be adjudged upon the law of Possession." The initial Congressional mandate thus simply adopted the customary Law of Possession. There still were no provisions for obtaining legal title; Congress neither authorized nor required anything whatsoever of the Executive Branch and its administrative departments. Thus questions such as default in performance of assessment work did not concern the United States, and could not properly arise in the Interior Department, but were clearly matters between adverse private claimants to be adjudicated in the courts.

In the years 1866-1872 Congress enacted three related mining statutes which govern the case at hand and which as noted above ratified the miners' customary law and in essence codified it for the future.[13] Congress adopted the prevailing assessment work standard, *i.e.*, one hundred dollars worth of work per year, and allowed for relocation

12. Even after Federal legislation was enacted to authorize creation of private rights in public domain mineral lands, this Court was of the view that most disputes between private parties did not present Federal questions calling for exercise of this Court's appellate jurisdiction. See, *e.g.*, *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505.

13. The Mining Act of 1866, 14 Stat. 251; The Placer Act of 1870, 16 Stat. 217; The Mining Law of May 10, 1872, 17 Stat. 91, 30 U.S.C. 21 *et seq.*; see generally Swenson, at pp. 716-723.

by a subsequent appropriator if there had been a default in performance of the work and such work had not been resumed.[14]

Congress also provided a less drastic sanction than relocation to encourage performance of assessment work by regulating priorities among different claimants depending upon whether they did the work. Congress provided that where a claim was owned by more than one person and work was performed by some but not all of the co-owners, those who did the work became entitled to ownership of the entire claim. 30 U.S.C. 28; see *Elder* v. *Horseshoe Mining & Milling Co.*, 194 U. S. 248, 256; *Van Sice* v. *Ibex Mining Co.*, 173 Fed. 895 (8th Cir. 1909). Significantly, Congress did not provide that failure of one co-owner to do the work would automatically forfeit his interest. His interest would continue unless the co-owners who had done the work demanded, by appropriate formalities, that he contribute his share of the expenses of the work, and he thereupon failed to make such contribution within the period specified by Congress. 30 U.S.C. 28.

Congress in 1866-1872 also authorized the passage of legal title to mineral lands, upon application to the appropriate local land office.[15] It is significant, however, that in providing for the passage of legal title, Congress did not call upon the Interior Department to regulate or control the private appropriation of mineral lands.[16] This was in marked contrast, for example, to the private appropria-

14. Act of May 10, 1872, sec. 5, c. 152, 17 Stat. 92, as amended, 30 U.S.C. 28.

15. Act of May 10, 1872, sec. 6, c. 152, 17 Stat. 92, as amended, 30 U.S.C. 29.

16. See, *e.g.*, *David W. Harper*, 74 I.D. 141, 150 (1967) ("The ordinary application to enter land under the various public land laws, or to lease land under the mineral leasing laws of the United States, imposes upon this Department the responsibility for determining whether the land can or should be disposed of pursuant to the par-

tion of agricultural lands, upon which the citizen could usually enter only after the Department had surveyed the lands and only after the Department had specifically authorized the citizen to enter the lands, and in which the citizen could obtain vested rights only after a minimum of five years of utilization of the land under the close supervision and regulation of the Department.[17]

In contrast, Congress provided that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase," 30 U.S.C. 22—in effect, that the first to discover and claim valuable minerals could have

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ticular law under which application is filed, whether the applicant is qualified under that law to have his application approved, and, if the land is suitable and the applicant is qualified, whether one applicant is to be preferred over another equally qualified applicant in the event of competing applications. It is only after the Department has made these determinations that any rights in the land vest in an applicant. *This is not true of the location of a mining claim.* The locator of a mining claim does not file an application to locate a claim, and the acts required for the location of a claim do not include even notice to this Department. The location of a valid mining claim is, in effect, a grant from the United States, and, by the location of a valid claim, the locator is vested with a present right of possession without action on the part of this Deparment"). (Emphasis added.) See also *The Clipper Min. Co.* v. *The Eli Min. & Land Co.*, 34 L.D. 401, 410 (1906) (". . . a mining location is not of record before or connected with the land department, and is not so connected or usually within the latter's knowledge until application for patent is filed or it is properly called in question by another . . .").

17. See, *e.g.*, Act of May 20, 1862, 12 Stat. 392; 43 U.S.C. 161-235. One who is proceeding to homestead has, prior to patent, "protection against intrusion by other settlers, but as against the Government his right is only conditional and inchoate." *Oscar O. Reeg*, 40 L.D. 206 (1911). At any time prior to patent the homesteader could be ousted, either by a Governmental withdrawal of the land from entry and settlement, see *Russian-American Co.* v. *United States*, 199 U. S. 570, or by a mining claimant who discovered valuable minerals within the homestead, or by any other development which indicated the presence of mineral values. See, *e.g.*, *Leonard* v. *Lennox*, 181 Fed. 760 (8th Cir. 1910).

them and would be protected in possession and enjoyment thereof. The citizen need not first resort to the Land Office and indeed need never resort there; the availability of a patent, upon application therefor, was an optional convenience for the citizen.[18]

This limited role for Interior stands in marked contrast to the more recent Congressional grants of broad authority to administrative agencies in terms of "public convenience and necessity" and the like, as well as in contrast to other grants of authority Interior itself, in areas such as homesteads and mineral leasing.[19] As the Secretary of the Interior stated in his annual report for 1930 at the height of the campaign to invalidate oil shale claims, ". . . oil shale claims valid in 1920 can be taken to patent under the mining law, without any discretionary power in this department to decline to issue the patent" (Pl. Ex. 15; A. 70).[20]

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18. "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property' subject to the lien of a judgment recovered against the owner in a state or territorial court. *Belk* v. *Meagher*, 104 U. S. 279, 283; *Manuel* v. *Wulff*, 152 U. S. 505, 510-511; *Elder* v. *Wood*, 208 U. S. 226, 232; *Bradford* v. *Morrison*, 212 U. S. 389. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent." *Wilbur* v. *Krushnic*, 280 U. S. 306, 316-317.

19. See, *e.g.*, *United States ex rel. McLennan* v. *Wilbur*, 283 U. S. 414.

20. Plaintiffs' Exhibits 1-307, inclusive, were all received in evidence together at R. 863, subject to objection to individual exhibits. Those relatively few objections were uniformly overruled, R. 918-934. Accordingly, to avoid repetition in citation, record references to any of these exhibits will omit the page at which they were admitted.

Congress intended that the annual assessment work requirement be effective only to regulate priorities as between rival locators, as it had always done, and not to impose any assessment work requirements insofar as obtaining valid rights from the United States was concerned.[21] Indeed, Congress did specify a separate objective standard to govern the rights of the United States in regard to the work done by a mining claimant; to require the United States to transfer title by a patent, the claim owner must expend five hundred dollars worth of labor or improvements upon his claim.[22] Moreover, Congress specified that if in the course of the Land Office's processing of a patent application there did arise a question under the Law of Possession, such as an assessment work dispute between rival claimants, the Land Office was not to decide that dispute. 30 U.S.C. 29, 30. Rather, the patent application proceedings "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction...." 30 U.S.C. 30. After a court had decided the dispute, the judgment roll was to be certified to the Land Office "and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." 30 U.S.C. 30. The purpose of this statute, this Court said in *Iron Silver Min. Co.* v. *Campbell*, 135 U. S. 286, 299, seems to be

> that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner

21. This is clearly implied by the right of the claim owner who ceases assessment work to protect against relocation by resuming assessment work.

22. 30 U.S.C. 29. There is no time limitation or requirement; the $500 may be expended in one week, or over 40 years.

> prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these claimants shall have the patent, the final evidence of title, from the government. . . .

In effect, then, the Federal legislation of 1866-1872 left questions arising under the Law of Possession where the 1865 Act had, in the courts, and left assessment work as a matter regulating only priorities between rival claimants.

The Department of the Interior long recognized, prior to 1920, by regulation and decision, that it had no jurisdiction over questions such as assessment work which arose only under the Law of Possession and that exclusive jurisdiction over them was in the courts. *E.g., Branagan* v. *Dulaney,* 2 L.D. 744, 749-50 (1884); *Alice Placer Mine,* 4 L.D. 314 (1886); *Aurora Lode* v. *Bulger Hill and Nuggett Gulch Placer,* 23 L.D. 95 (1896). Some questions, such as discovery, could arise either under the Law of Possession or during an Interior determination as to the validity, as against the United States, of a mining claim, and in the latter case Interior did have jurisdiction to proceed. Congress had made the discovery of mineral a condition precedent to the grant effected by the mining law, and hence discovery was a matter that did concern the government. But assessment work (unlike discovery and the $500 patent work requirement) did not concern the United States, and thus could arise only under the Law of Possession. Interior's basic mining regulations recognized this: "The annual expenditure of $100 in labor or improvements on a mining claim . . . is . . . solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession,

the determination of which is committed exclusively to the courts."[23] *Accord, P. Wolenberg,* 29 L.D. 302, 303-304 (1899) (vacating an order by the Commissioner of the General Land Office to inquire into the performance of assessment work, noting "the order involves matters which the land department can not inquire into . . . [and] clearly relates to matters over which the land department is without authority . . . and goes only to the right of possession, the determination of which is committed to the courts and not to the land department"[24]); *Nielson* v. *Champagne Mining & Milling Co.,* 29 L.D. 491 (1900).[25]

23. This regulation had long been in effect by the time the Congress began consideration of the Mineral Leasing Act of 1920 and remained in effect throughout that period and thereafter until the present time. See, *e.g., Regulations,* 37 L.D. 757, 769 (1909); *Regulations,* 49 L.D. 58, 73 (1922); 43 C.F.R. 3420.4 (1969).

24. The Secretary continued that assessment work "is essentially different from" the patent work requirement, "which makes the expenditure of five hundred dollars, in labor or improvements a condition to the issuance of patent, and therefore a matter between the applicant for patent and the government, the determination of which is committed to the land department." 29 L.D. at 304.

25. Although Interior was to contend that the passage of the Mineral Leasing Act of 1920 for the first time gave it jurisdiction with respect to assessment work on pre-1920 claims for lands containing leasable minerals, it continued to acknowledge that with respect to non-leasable minerals, *e.g.,* gold, silver, copper, zinc, lead, it had no jurisdiction over assessment work. *E.g., Proceedings Against Mining Claims Within the Area of the Boulder Dam Project, Instructions,* 53 I.D. 228 (1930); *Challenges to Validity of Mining Claims in National Parks,* 53 I.D. 491 (1931). The areas covered by these general pronouncements had certainly been "withdrawn"; the contrary implication in the Government's brief, p. 56 n. 22, is at best mistaken. Shortly prior to the Mineral Leasing Act of 1920 Interior acknowledged that it had no concern with assessment work on oil shale claims (Pl. Ex. 51; A. 99-100; Pl. Ex. 52; A. 100) and it returned to this position in 1935 after this Court's decision in *Ickes* v. *Virginia Colorado Development Corp.,* 295 U. S. 639. *E.g.,* Pl. Ex. 55; A. 102 ("this office has no jurisdiction over questions relating to the performance of annual assessment work on mining claims, such questions being committed exclusively to the courts.").

The 1866-1872 Federal mining legislation remained in effect throughout the period in which the mining claims in suit were initiated. In 1896 the Land Office did temporarily question whether the mining legislation applied to petroleum, as the Land Office had often ruled that it had, but on reconsideration the Land Office adhered to its prior rulings. At the same time, Congress confirmed that the mining legislation did and should apply to petroleum.[26]

The Mineral Leasing Act of 1920 amended the mining laws by substituting leasing for new mining claims for a few specified minerals, including oil shale. As to previously initiated mining claims, the Act made no change; on the contrary it specifically provided that they should continue to be governed by "the laws under which initiated." Act of February 25, 1920, 41 Stat. 451, 30 U.S.C. 193. These laws had made assessment work solely a test for adjusting priorities among rival private claimants, and included a prior claimant's right to foreclose a subsequent claim by resuming his work.[27] That those and all other incidents of ownership of pre-Leasing Act claims were to continue appears both from the clear language of the excepting clause of the Act and from the explanation of the leasing bill on the floor of the House given by Representative Taylor of Colorado, one of the conferees and a

26. See *Union Oil Co.*, 23 L.D. 222 (1896), *On Review*, 25 L.D. 351 (1897); 29 Stat. 526 (1897).

27. While prior to the Multiple Mineral Development Act of 1954, 30 U.S.C. 521-531, the Mineral Leasing Act arguably precluded subsequent relocations of excepted valid claims (the question was never decided), the alternative sanction the mining statutes provided to encourage performance of assessment work, transfer of ownership from a co-owner who did not do work to others who did, always remained fully effective. After the 1954 legislation, oil shale claims were open to relocation for non-leasing act minerals and the post-1954 assessment work done on the claims in suit, which the Government's brief disparages (pp. 19-21), had in fact the function of protecting the claims.

manager of the bill on behalf of the House: he made clear that owners of existing mining claims were by the excepting clause "entitled to go ahead and maintain and perfect their claims under the present existing laws and obtain a patent to their lands just as though this bill had never been passed." 59 Cong. Rec. 2711-12 (Feb. 10, 1920).

The 1920 Act's continuation, unaltered, of the mining laws for previously initiated claims stands in marked contrast to previous legislation in which Congress had clearly expressed a decision to make assessment work a matter of concern to the United States. When this was what Congress intended, it said clearly and simply that a default in performance of assessment work would "forfeit" the claim.[28]

The limited scope of the authority that the Federal legislative scheme conferred upon Interior with respect to mining claims appears from the fact that as late as 1913 Interior was of the view that it could not inquire into the validity of any mining claim unless it had before it an application to take the claim to patent.[29] This question was not settled until 1920 in *Cameron* v. *United States*, 252 U. S. 450, where this Court rejected the argument that all that Interior had power to do was to reject a patent application. Significantly in terms of the Government's brief

28. The Act of March 2, 1907, 34 Stat. 1243, *"An Act to amend the laws governing labor or improvements upon mining claims in Alaska"* states: "And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited. . . ." The Act of January 11, 1915, 38 Stat. 792, validating certain phosphate claims, applied only to claims "upon which assessment work has been annually performed."

29. *Nichols and Smith* (Interior, October 24, 1913). Prior to *Nichols and Smith* Interior had briefly taken the contrary position. See *Cameron* v. *United States*, 252 U. S. 450, 453, 463. The provisions of the mining statutes for processing patent applications are the only statutes which mention the Land Office in the context of mining claims.

here, although *Cameron* involved withdrawn land for which the United States had "competing specific uses," the Court there did not regard that as affecting Interior's authority. Rather, it ruled that the Land Office had "jurisdiction" to determine whether equitable title had passed, and that this "power" of the department continued until legal title passed, although the mineral land law did not itself confer such "authority" on the land department.[30]

Oil shale mining claims validly initiated prior to the Mineral Leasing Act represent property interests that arose under the 1866-1872 mining statutes and were in fact approved by the Executive Branch, for although from about 1907 on the Executive Branch generally did withdraw from private appropriation under the mineral laws lands clearly known to be valuable for minerals,[31] it refrained from doing as to the oil shale deposits of the Green River Formation in Colorado, Utah and Wyoming. Field reconnaissance during 1913-1915 confirmed the presence of these deposits. Their value and national importance appeared from their magnitude and richness, the history of flourishing oil shale industries in Scotland and elsewhere based on deposits inferior to those of the Green River Formation, the expanding demand for liquid hydrocarbons, and the dwindling reserves of conventional oil and gas. In view of this information, in the spring of 1916 Interior formally classified Green River Formation lands as valuable for their mineral deposits,

30. *Cameron* v. *United States*, 252 U. S. 450, 461. The Court's equating of "power", "jurisdiction", and "authority" is significant in view of the dispute here as to the meaning of this Court's statement in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, 647, that the assessment work contests and decisions "went beyond the authority conferred by law."

31. See generally, Swenson, at pp. 726-736.

thereby precluding their appropriation under the non-mineral land laws.[32]

Significantly, however, at the same time Interior considered and rejected the possibility of withdrawing the lands from private appropriation under the mining laws as well. It did so knowing that large research and development expenditures and many years of work would be needed to bring about the technological capacity the nation required to utilize the oil shale deposits, and expecting that the availability of oil shale lands under the mining laws would induce private parties to bring about the desired technological capability.[33]

Although some oil shale mining claims had been initiated prior to Interior's decision in the spring of 1916 to leave Green River Formation lands open to private appropriation[34], the great majority of them, including all of the claims now before this Court, were initiated thereafter. There can be no doubt that the availability of such lands has been an indispensable factor in inducing large private expenditures (and related Governmental expenditures urged by private parties) on oil shale research and development, including expenditures by the owners of the claims now before this Court. The result of these expenditures is

32. See, *e.g.*, Deft. Ex. N; R. 7584-7862, 896. See generally, Winchester, *Oil Shale in Northwestern Colorado and Adjacent Areas*, United States Geological Survey Bulletin No. 641-F, in *Contributions to Economic Geology*, 1916, Part II (Gov't Print. Off. 1916), pp. 139-142; Gavin, *Oil-Shale, An Historical, Technical, and Economic Study*, United States Bureau of Mines Bulletin 210 (Govt. Print. Off. 1922), pp. 3-18, 55-59, 111, 137.

33. "The lands have not been recommended for withdrawal because the oil-shale industry is not yet developed in the United States, and as it is desired to give opportunity for the establishment of experimental plants, it is believed the lands should remain open for the present to acquisition under the mineral-land laws . . ." Pl. Ex. 220; R. 2114-15.

34. See, *e.g.*, Pl. Ex. 231; R. 2178-98.

that there are now available at least three different technological processes by which the oil shale deposits of the Green River Formation can be utilized.[35]

The value to the Government of these technologies appears not only from its general interests in the strength of the domestic economy, but also from its proprietary interests.[36] The Government today owns free and clear of any private oil shale claims most of the nation's oil shale deposits. This is exceptional in view of the general purposes and consequences of the public land laws, both mineral and non-mineral. These laws, broadly speaking, had as their object the development of the western two-thirds of the country by the grant of rights to land to those willing to develop it. Under those laws, hundreds of millions of acres of public land have passed, and are still passing, to private ownership. The colossal scale of this transfer appears from the fact that while the Federal Government has at one time or another owned "three-fourths" of all of the United States—almost two billion acres of public land and resources,"[37] it now owns, exclusive of 200 million acres in national parks and forests, only 465 million acres.[38]

35. Department of the Interior, *Prospects for Oil Shale Development*, pp. 45-48 (1968).

36. The magnitude of these interests is suggested by a bid the respondent The Oil Shale Corporation made in December 1968 to lease 5,120 acres of Federal oil shale land in Colorado (offered for lease at 33 Fed. Reg. 16154, Nov. 5, 1968). The projected operations contemplated mining and processing of oil shale yielding an average of 40 gallons of oil per ton, for which the royalty would have been $.24 per ton. 33 Fed. Reg. at 16156. At the projected mining rates, 66,000 tons per day for 330 days per year, the annual royalty would have been $5,250,000. The project life was 20 years.

37. "Program for the Public Lands and Resources," U. S. Dept. of the Int., May 1962 (U. S. Govt. Print. Off., 1963), p. 9.

38. Information Bulletin No. 1, Bureau of Land Management, U. S. Dept. of the Int. (U. S. Govt. Print. Off. 1965).

This transfer to private ownership of two-thirds of what has been public domain has not, however, been reflected in oil shale, and the present pattern of ownership of oil shale land is not typical of that process of transfer. The Federal Government still owns the great bulk of the principal oil shale deposits, those of the Green River Formation.[39] It owns approximately 82% of the estimated shale oil in place in Colorado.[40] The balance is divided between oil shale lands patented to private individuals over the 40 years from 1920 to 1960 and oil shale lands embraced within unpatented mining claims, including the claims in this litigation.

The Development and Course of the Oil Shale Assessment Work Controversy

The widespread interest in the oil shale of western Colorado which developed in the decade immediately preceding passage of the Mineral Leasing Act of 1920 and an appreciation of the value of these deposits led Congress to include oil shale as one of the minerals withdrawn from claim location by that Act. Interior was well aware of the location of numerous oil shale claims prior to passage of the Act,[41] and section 37 of the Act shows

39. The oil shale deposits of the Green River Formation in Colorado, Utah and Wyoming have been described as "the largest known concentration of hydrocarbons in the world". See, for example, the "Interim Report of the Oil Shale Advisory Board to the Secretary of the Interior, February 1, 1965" reprinted in "Federal Oil Shale Program", Hearings before the Senate Committee on Interior and Insular Affairs, 90th Cong., 1st Sess., p. 278 (1967).

40. *Id.* at 279. The same report (*Id.* at 278) is authority for the fact that 75% of the known deposits of oil shale of the Green River Formation lies in the so-called Piceance Creek Basin of Colorado.

41. This is shown, for example, by the 1918 investigations conducted by Interior at the request of the Attorney General of the Oyler claims involved in *Brown* and other oil shale claims located prior to

Congressional awareness of that activity.[42] It was also the announcement of a policy that valid claims were to be unaffected by the passage of the Act but were to be left to the regime established by the Mining Laws. These laws of course imposed conditions upon the validity of mining claims; when the first oil shale patent application reached the Department shortly after passage of the Mineral Leasing Act, the Commissioner of the General Land Office argued for its rejection on broad grounds which would have precluded recognition of the validity of any oil shale claims (Pl. Ex. 1; A. 62). That suggestion was decisively rejected in the Secretary's published *Instructions* of May 10, 1920, 47 L.D. 548 (Pl. Ex. 60; A. 105-110). The *Instructions* noted that "oil shale has been long recognized as a valuable mineral deposit" (47 L.D. at 549), that the Geological Survey had reported in 1916 that "in view of the high prospective mineral value of lands underlain by oil shale deposits . . . they should not be permitted to be acquired under the non-mineral land laws" (*id.* at 550-51), that the lands had been classified as valuable for minerals, and that Congress, in recognition of its value, had included oil shale in the Leasing Act.[43]

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the establishment of the Naval Oil Shale Reserve but within its outer perimeter (Pl. Ex 225-232; R. 2133-2202; see App. 243-249).

42. Deposits of oil shale "in lands valuable" therefor were thenceforth to be disposed of only pursuant to the Act "except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Act of February 25, 1920, c. 85, §37, 41 Stat. 451, 30 U.S.C. 193 (1964).

43. The Secretary said of the 1920 Instructions that they were "prepared after careful study of the mining laws and decisions by the legal force of this Department, and in the unanimous opinion of that force was the only conclusion that could be reached under the law and the facts" (Pl. Ex. 62; A. 110).

The 1920 *Instructions* did not, of course, preclude a showing as to the invalidity of individual claims, and as patent applications were filed in the local land offices Interior made such determinations as to the claims involved. In the latter 1920's Interior embarked upon a "field investigation . . . of all oil shale claims" (Pl. Ex. 2; A. 64), whether or not patent applications had been filed, in the evident hope that "by proceeding now against such locations evidence may be gathered which might not be available in the future should applications for patent be filed" (Pl. Ex. 3; A. 65). Interior had by then taken the position that continuous performance of assessment work was an aspect of the validity of oil shale claims, and the investigations ranged into that question as well as all actual aspects of the validity of the claims, "and charges [were] preferred against such locations as were reported to be invalid for any cause, such as, lack of discovery, dummy locators and failure to perform annual assessment work, and where [patent] applications have been filed failure to perform the required patent expenditures" (Pl. Ex. 5; A. 67). Where the evidence was thought adequate to sustain a charge other than failure to perform assessment work, Interior would declare the claim invalid on the additional ground.[44] See *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37 (D.C. Cir. 1963), *cert. denied*, 375 U. S. 822, for an example of a decision on the ground of abandonment.

The "assessment work controversy" thus was only a part of a commendable effort to determine the validity

44. The statement in the Government's brief that the Secretary "began a practice of limiting the investigations and charges to the assessment work issue" (p. 13) is unsupported. In particular the Government cites no evidence, and there is none in the record, that the field investigators were ever instructed to consider only the assessment work question.

of all oil shale claims when that could best be done. It became a major controversy, however, for two basic reasons. First, Interior's legal position on assessment work represented an abrupt departure from long settled law and thus presented a bitterly disputable question of law, one of subject matter jurisdiction at that, common to all oil shale claims.[45] Second, it generally appeared to Interior's field investigators that sufficient assessment work was not being performed. This appeared for several reasons, probably chief among which was the financial inability of the claim owners to expend $100 a year on each claim. Rural communities experienced a depression as early as 1921, and by the end of 1929 the entire economy had been brought down. Another major reason, however, undoubtedly was that Interior took the view that work qualified as assessment work only if it effected, or physically facilitated, the actual extraction of oil shale deposits from the particular claim. See, *e.g.*, *Emil L. Krushnic*, 52 L.D. 282, 292-294 (1927). The kind of work needed to bring about commercial production from oil shale was laboratory and pilot-plant research and development work on the processing of oil shale which had already been mined,[46] and Interior refused to recognize such work as assessment work. Thus it was that the hundreds of thousands of dollars that the Index Oil Shale Company, in which the family of respondent Penelope Chase Brown figured prominently, spent during the 1920's on its research and development operations had no influ-

45. On the other hand, in cases where charges such as abandonment or lack of discovery were raised, although there might be a sharp factual issue to be resolved at hearings, there was then and is now no question of Interior's right to challenge claims on such grounds.

46. This point was, for example, explicitly recognized in Congressional consideration of the inclusion of oil shale in the Mineral Leasing Act. See pp. 16-17, *supra*.

ence on Interior's decision in 1929 to contest the four Oyler claims for insufficient (i.e., less than $400 per year) assessment work. In brief, Interior would not recognize useful work, and there was little point in doing work it would recognize—even had the money been available.

This distinction between assessment work charges and other grounds for challenge appeared in the contest proceedings begun in 1923 against the Spad No. 3 oil shale claim in what became the first test case on the assessment work issue. The charges included fraudulent location and lack of discovery as well as a charge that for one year "neither the applicant nor his predecessors in interest performed any assessment work to the value of at least $100, tending to develop the claim." The other charges were dismissed after a hearing, and the assessment work charge was thus the sole ground upon which the Commissioner of the General Land Office adjudged the claim invalid. Upon appeal, the Secretary affirmed the Commissioner (*Emil L. Krushnic*, 52 L.D. 282 (1927)), over the claimant's arguments against "the insufficiency of [the assessment work] charge as a valid charge," arguments which were that

> . . . the Government is not by the leasing act (act of February 25, 1920) invested with the character of an adverse claimant; that no annual assessment work has been required to maintain claims theretofore initiated and existent at the date of the passage of said act; that the claim does not become *ipso facto* void upon default in the performance of assessment work, but it would be necessary, to effect such a forfeiture, to assert and establish the same in an independent tribunal. (*Id.* at 285)

The decision upon rehearing, 52 L.D. 295 (1928), adhering to the original decision, emphasized the nature of the

case as a test of the jurisdictional issue and noted the appearance in the case on reargument of other oil shale claimants as *amici curiae*.[47]

It was in the course of this campaign of investigation and challenge of oil shale claims that the three contests were brought against the claims in suit: Contest 11757 against the Bute claims, Contest 11759 against the Atlas claims, and Contest 11761 against the Camp Bird claims. They were commenced at the direction of the Commissioner of the General Land Office in December 1927 on the single charge of a failure to perform annual assessment work (Pl. Ex. 9, 11 and 13; R. 1554-55, 1558-59, and 1562-63), and were thus unlike the *Krushnic* contest, where the field investigation indicated that other charges, as well, should be raised. As in the *Krushnic* contest, however, the assessment work charge alone was the basis for decisions by the Commissioner on May 4, 1928, declaring the Bute, Camp Bird and Atlas claims null and void (Pl. Ex. 10, 12 and 14; R. 1556-57, 1560-61, and 1564-65).

In 1930, however, this Court held that the Secretary's decision in the *Krushnic* case on the same assessment work charge was "contrary to [the] explicit terms" of the Leasing Act. *Wilbur* v. *Krushnic,* 280 U. S. 306, 319. The rationale of the decision was that prior to passage of the Mineral Leasing Act "annual performance of labor was not necessary to preserve the possessory right . . . as against the United States, but only as against subsequent relocators," that, indeed, upon performance of $500 worth of work in the aggregate on a claim the claimant might obtain patent "even though in some years annual assessment labor had been omitted,"

47. The suggestion in the Government brief (pp. 13-14) that Krushnic was the single oil shale claimant interested in the assessment work issue is thus quite wrong.

and that the owner of a mining claim "equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened," for resumption of work was "not in derogation but in affirmance of the original location" and "preserves an existing estate." The Court concluded that "the Secretary's decision to the contrary violates the plain words of the excepting clause of the Leasing Act." (*Id.* at 317-18; italics omitted).

Interior's reaction to the Supreme Court's *Krushnic* decision was to resume the campaign on the assessment work charge after altering slightly the form of its proceedings "in order to test out the extent of the authority (if any) left to us by the Supreme Court decision . . ." (Pl. Ex. 47; A. 96).[48] The change in procedure involved an elaboration of the contest complaint to charge not only that assessment work had not been performed, but also that it had not been resumed, and a posting of the land embraced within the claims to show a physical challenge to their validity by the United States. The altered procedures reflected the Secretary's view as expressed in his annual report for 1930 that the *Krushnic* decision "although it reversed the department and sustained the claimants on the issue of assessment work . . . left the possibility (though no certainty) that if the remaining claims were posted before resumption of work on the claim, a different result would follow. This posting work will continue during the current year, and the tremendous task of adjudicating these claims will get under way. A second test case in the courts may be expected" (Pl. Ex. 15; A. 70).

48. Testimony of Secretary Wilbur before the Senate Committee on Public Lands, February 12, 1931.

The resumption of the campaign along the altered lines reflected of course the Secretary's view that decisions declaring oil shale claims null and void on the pre-*Krushnic* assessment work allegation were wholly ineffective. Secretary Wilbur thus acted to give effect to this Court's decision in *Krushnic,* just as his successor, Secretary Ickes, was to give effect, as administrative policy, to this Court's later decision in the *Virginia-Colorado* case. This is shown by instructions to the field force shortly after the *Krushnic* decision to "submit . . . reports in all cases" where there was no evidence of resumption of work (Pl. Ex. 16; A. 70-71), so that new challenges might be asserted. It was shown also in the Secretary's statement, following the *Krushnic* decision, as to the very claims in suit here, that "the action declaring . . . claims null and void on the charge as made, is not tenable . . . . It will, therefore, be necessary not only to post the claims that are still undisposed of, but also those which have been heretofore declared null and void" (Pl. Ex. 25; A. 80). The Secretary therefore approved new proceedings against the claims.[49] The Commissioner of the General Land Office, in turn, instructed the Chief of the Field Division to treat the claims the same as others then in the course of being investigated, inasmuch as "charges of failure to do assessment work" upon which the prior administrative decisions rested "were of no effect, in view of the decision of the Supreme Court of the United States in said *Krushnic* case, and all oil shale claims, which were proceeded against and declared null and void on that

49. Despite this clear administrative vacation of the 1928 decisions against the claims in suit, the Government's Brief (p. 5) would have this Court revive them, if indeed they ever lived. Of course, if they possessed vitality, Interior would not have brought nor would the Government now have to rely upon the post-*Krushnic* assessment work proceedings against the claims in suit.

charge alone . . . will have to be proceeded against anew" (Pl. Ex. 26; A. 81). In response to advice from the field that assessment work had not been performed for the year ended July 1, 1929, and had not since been resumed (Pl. Ex. 27; R. 1600), the Commissioner, by letters of June 30, 1930, addressed to the Register of the Denver Land Office, directed that adverse proceedings be renewed (Pl. Ex. 29; R. 1601).

In respect to Contest 11757 against the Bute claims the letter of June 30, 1930 (Pl. Ex. 30; R. 1602-03)[50], recited the facts of the prior proceedings and directed new proceedings against the claims on the ground "that annual assessment work to the value of $100" was not performed for the year ending July 1, 1929 "and that work has not been since resumed."[51] In a decision of July 3, 1931 (Pl. Ex. 31; A. 82) the Commissioner, referring to a report of service of notice of the charge on eight of the ten parties named, stated that "The failures of the parties served with notice to file answers denying the charge are taken as admissions by them of the truth thereof" and declared the Bute claims 1-48 null and void to the extent of the interest of the parties served. In a subsequent letter of November 9, 1931, the Commissioner, reciting a report of service on the remaining parties named and their failure to answer, declared the remaining interests in the claims null and void (Pl. Ex. 32; A. 83).

50. The letter of June 30, 1930, inadvertently directed proceedings against only Bute claims Nos. 1-18; a subsequent letter of July 22, 1930, corrected the error and directed that all 48 claims be proceeded against (Pl. Ex. 30; R. 1604-05).

51. The charge upon which the claims were attacked, that for a single year assessment work of at least $100 had not been performed (not, it should be noted, that *no* assessment work was performed), is a far cry from an allegation that the claims were abandoned. The suggestion in the Government's brief that assessment work decisions served to clear the land of abandoned claims (p. 42) is contrary to the facts.

The renewed proceedings in Contests 11759 and 11761 were directed on a charge phrased in substance identically with that in Contest 11757 (Pl. Ex. 33, 35; R. 1613-14, 1617-18). In Contests 11759 in a decision of October 8, 1931, the Commissioner, having been advised of service on seven of eight parties named, declared the Atlas claims 1-18 null and void to the extent of the interests of the parties served (Pl. Ex. 34; A. 83-84). No further adverse decision was ever entered with respect to the Atlas claims. In Contest 11761, following advice that service of notice of the charge of seven of nine parties named had been made and that no answers had been interposed in the contest, the Commissioner by letter of October 20, 1931, to the Register, declared the Camp Bird claims 1-20 "null and void to the extent of the interest of the parties served . . . " (Pl. Ex. 85; A. 1619). No further adverse decision was ever entered with respect to the Camp Bird claims.

The renewed post-*Krushnic* proceedings in Contests 11757, 11759 and 11761 were part of a campaign embracing hundreds of contemporaneous contest proceedings. One of the many was Contest 13003 commenced in 1931 against the Mt. Mamm claims 12-17 owned by the Virginia-Colorado Development Corporation. The Commissioner's decision in that case, a letter of January 20, 1932, declaring the claims null and void for failure to perform assessment work for the year ending July 1, 1931, was affirmed by Secretary Wilbur on May 24, 1932. *Virginia-Colorado Development Corporation,* 53 I.D. 666. That decision, which was not distinguishable on its facts or its reasoning from others being rendered by the Commissioner or the Secretary, became when the claimants sought judicial review the "second test case in the courts" which the Sec-

retary's 1930 report had said was to be expected. *Supra*, p. 25.

On March 10, 1933, in a suit for mandatory injunction a trial court in the District of Columbia reversed the Secretary's decision. On January 22, 1934, the Court of Appeals for the District of Columbia affirmed the decision of the lower court in the *Virginia-Colorado* case. 69 F. 2d 123. On review in this Court the decision of the Court of Appeals was unanimously affirmed in an opinion by Mr. Chief Justice Hughes. *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639 (June 3, 1935). The decision reaffirmed that prior to enactment of the Mineral Leasing Act the United States acquired no rights vis-a-vis the owner of a mining claim by virtue of any failure to perform annual assessment work. While the Leasing Act "inaugurated a new policy . . . by express provision the Act saved existing valid claims . . . 'maintained in compliance with the laws under which initiated' ", and the Court held that the plaintiff "came directly within the exception", which was a "part of the policy of the Act. Its terms explicitly declare the will of Congress as to valid existing claims, with full understanding of the status of such claims under prior law." *Id.* at 645-46. Chief Justice Hughes said that the "reservation" in the *Krushnic* opinion "does not aid the Government in its contention here" for a challenge to the claims, to be effective "must have some proper basis. No such basis is shown. We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law." *Id.* at 646-47.

Interior's Response to the *Virginia-Colorado* Decision

This Court's decision in the *Virginia-Colorado* case on June 3, 1935, touched off numerous inquiries to Interior from its employees in the field, as well as from members of the public and the Congress, as to the effect of that decision upon the status of other pending cases or earlier decisions which involved the assessment work charge. The replies reflected Interior's intention to deal with these particular situations for what they were, aspects of a single issue to be appropriately dealt with in one comprehensive response.[52]

The Department's response to the *Virginia-Colorado* decision, thus foreshadowed, was set forth by First Assistant Secretary Walters in a published decision in *The Shale Oil Company*, 55 I.D. 287 (June 24, 1935) (Pl. Ex. 70; A. 121-123). He reviewed the course of the second (post-*Krushnic*) phase of the assessment work controversy, the challenge by the mineral claimant to "the jurisdiction of the

52. For example, the Commissioner advised the Secretary of the Parachute Mining District, Grand Valley, Colorado, that "action on oil shale cases will remain suspended until final action is taken by the Department in the [*Virginia-Colorado*] case" (Pl. Ex. 66; A. 117-118). In another situation, Commissioner Johnson, in a letter of June 24, 1935, advised Senator Costigan that an inquiry (Pl. Ex. 67; A. 118-119) from a constituent, Joseph Ahearn, as to how he and the other locators of a group of oil shale claims in Colorado might clear their title "of the cloud placed upon it" by the Secretary's action against the claims in 1931 on the assessment work charge "which the Supreme Court of the United States in a decision put out on June 3rd declared to be beyond his authority", would be treated "as an informal request for reconsideration of the Department's decision of June 30, 1932, referred to above" and "transmitted to the Secretary of the Interior for his consideration" (Pl. Ex. 68; A. 119-120).

Department to prefer the [assessment work] charges," the decision of the Commissioner adverse to the claimant's contentions, and the contrary decision of the Supreme Court on that question in the *Virginia-Colorado* case. "In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein in the instant case must be held as *without authority of law and void*" (emphasis supplied). Secretary Walters did not content himself with a statement adequate to dispose merely of the case before him. On the contrary, the decision continued in language intended to dispose not of a single skirmish but of a whole campaign.

> The above-mentioned decision of the Department in the *Virginia-Colorado Development Corporation* case and the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of *Francis D. Weaver* and *Federal Oil Shale Company* and other Departmental decisions in conflict with this decision are hereby overruled. The Commissioner's decision is reversed and the record in the case remanded with instructions to reinstate the application and entry *in toto* and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clearlist the application for patent.

Just as after *Krushnic* the Department had acted to give effect to this Court's decision, so after *Virginia-Colorado* the Department again took the action appropriate to conform its administration of the law to the views expressed by this Court. It acted by a broad administrative ruling to avoid pointless individual lawsuits or rehearings in the Department to deprive of effect all prior assessment work

decisions, which were uniformly thereafter (until the present controversy) treated as nullities without effect in any respect.

1. Dismissal of Pending Cases

On the basis of the *Shale Oil Company* decision the Commissioner of the General Land Office in July 1935 addressed instructions to the Land Offices in the oil shale districts of Colorado, Utah and Wyoming as to the disposition of the pending assessment work cases in those offices:

> [I]n view [of the *Shale Oil* decision] and of the Department's action in remanding the Shale Oil Company case with instructions to reinstate the application and entry in toto and dispose of the same unaffected by the default in the performance of annual assessment work, you are instructed to close out on your records and transmit to this office all contest cases involving solely [the assessment work question] where no answer has been filed by the claimants. In all cases involving only the question of annual assessment work where answer has been filed by any of the contestees, you will transmit the records to this office without action (Pl. Ex. 71; A. 123-124; see also Pl. Ex. 72, 74, 75; A. 125-126, 127-129).[53]

Assessment work cases then pending on appeal before the Secretary or the Commissioner were disposed of on

53. Five years later there were still administrative loose ends to be tied, and in a further series of instructions in 1940 the Commissioner repeated his instructions of 1935, again on the basis that "in view of the rulings made [by the Supreme Court] and in the case of *Shale Oil Company* . . . the previous decisions of the Department declaring oil shale placer mining claims forfeited because of the failure of the

the authority of the *Shale Oil* decision.[54] For example, in one such case, *Joseph D. Ahearn,* Under Secretary West vacated a 1932 assessment work decision in recognition that "the action of the Department in declaring the claims involved forfeited was without authority of law and void" (Pl. Ex. 69; A. 120-121).[55]

Cases which were no longer pending in local Land Offices or on appeal in the Department were not matters on any docket and hence as to them there was no administrative record to be cleared, so no affirmative clerical action was needed such as that directed to be done as to cases in the Land Offices or such as the formal dismissal of pending appeals. Cases which had been completed prior to the *Shale Oil Company* decision thus required no action beyond that pronouncement itself. In the Department's subsequent and frequent occasions to consider assessment work contest decisions it was never regarded as material whether a case had been closed or was still pending when the *Shale Oil* decision was promulgated.

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claimants to perform the annual assessment work . . . were held to be without force and effect." In light of that the Registers were instructed to close out assessment work cases, if any, still pending and were notified that the assessment work charge, in any cases which presented that issue together with others, was dismissed (Pl. Ex. 82, 85, 87, 89; A. 139-140, 142-145; also Pl. Ex. 84; A. 141-142).

54. See, *e.g., United States* v. *Bloss,* July 30, 1935 (Pl. Ex. 76; A. 130); *United States* v. *U. S. Oil Shale Company,* July 30, 1935 (Pl. Ex. 77; A. 131-132); *United States* v. *K. C. Schuyler,* August 1, 1935 (Pl. Ex. 78; A. 132-136); *United States* v. *Wright,* August 13, 1935 (Pl. Ex. 45; A. 93-94); letter, dated August 19, 1935 from Commissioner Johnson to the Salt Lake City Register (Pl. Ex. 79; A. 137-138); letter, dated August 19, 1935, from Commissioner Johnson to the Denver Register (Pl. Ex. 80; A. 138-139).

55. Secretary West's decision also noted that inasmuch as no patent application had been filed for the claims, "the matter will stand

2. Reflection of the *Shale Oil* Decision in Interior Correspondence

Interior's intention that the *Shale Oil Company* decision should constitute across-the-board administrative action depriving of effect all previous departmental decisions based upon the assessment work charge is shown in correspondence conducted by Interior with representatives of both the legislative and executive branches of the Federal government, in internal communications among employees of Interior itself, and in correspondence conducted by representatives of Interior with the general public.

For example, in a letter of July 17, 1935, within three weeks of the *Shale Oil* decision, Commissioner Johnson wrote to Representative Taylor of Colorado that in *Shale Oil* the Department had "overruled its previous decision in conflict with the decision of the Supreme Court." He concluded that "it seems obvious that any declarations that [oil shale claims] were null and void, heretofore made by this office solely upon [the assessment work] ground, are without legal effect and void" (Pl. Ex. 175; A. 194-195).

In a letter of June 16, 1939 (Pl. Ex. 6; A. 68-69) to Chairman DeRouen of the House Committee on Public Lands, Secretary Ickes showed his appreciation that the oil shale assessment work campaign had been without effect:

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as if no adverse proceedings had been brought. If and when application for patent shall be filed for these placer claims such application will be considered on its merits. In the meantime, so far as the records of the Land Department are concerned, the lands involved appear and are regarded as vacant and unappropriated public lands." Thus, even a valid claim (so far as assessment work is concerned) is ignored by the Department until patent is applied for ("vacant and unappropriated public lands").

> Conceiving that the Mineral Leasing Act conferred such authority upon him, the Secretary of the Interior challenged in departmental proceedings the validity of thousands of these claims. After full hearings the claims were declared void because of default in assessment work. Appeal was taken from these proceedings and in the cases of *Wilbur* v. *Krushnic*, 280 U. S. 306 (1930) and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639 (1935) the Supreme Court held that the proceedings exceeded the authority of the Secretary and were, therefore, without effect. From these decisions it is apparent that, although the performance of annual assessment work is expressly required by law, there is no statutory authority to enforce that requirement (A. 69).

In a letter of March 21, 1946, to Senator Myers in response to an inquiry about the Oil Dome oil shale claims, Acting Secretary Chapman, after noting that Interior's records showed that the oil shale claims in question had been declared null and void on November 10, 1931, for failure to do assessment work, advised the Senator that:

> However, in the case of the Oil Shale Company (55 I.D. 287, 290), decided June 24, 1935, the Department recalled and vacated its action in the Virginia-Colorado Development Corporation case (53 I.D. 666), and overruled its action in other cases, including this one (Pl. Ex. 204; A. 227-228).

The Oil Dome claims, like those here, were purportedly cancelled in proceedings in which none of the claimants appeared or answered, and in which no administrative appeal was taken and no judicial review then sought (Pl. Ex. 205; A. 228-229).

Statements made and advice given to members of the public were no less unequivocal in making clear the Department's consistent position that the action taken by it following upon the Supreme Court's decision in the *Virginia-Colorado* case had served to deprive of effect all assessment work contest decisions. This appears, for example, in a letter of July 17, 1935 (Pl. Ex. 136-A; A. 183-184) from Commissioner Johnson to Edward Altenbern of DeBeque, Colorado. In that letter the Commissioner noted that the *Shale Oil Company* decision had "recalled and vacated its decision in the Virginia-Colorado Development Corporation case and overruled all its previous decisions in conflict with the decision of the Supreme Court."

> You are, therefore, advised that so far as the jurisdiction of this office is concerned, any declaration by it that an oil shale placer claim is null and void based solely on a charge that the claimant failed to perform annual assessment work or resume work on the claim is void and does not affect the right of the owner of the claim to maintain his possession thereof under the mining laws (A. 184).

The Commissioner made the same point in correspondence in 1936 with Ida Dere, a resident of Grand Valley, Colorado. Mrs. Dere had written to Commissioner Johnson (Pl. Ex. 181; A. 200) that representatives of Interior had convinced her in 1927 or 1928 "that it would be useless to go to the extent of answering the Government contest", but referring to the Supreme Court decision in *Virginia-Colorado,* which "seemingly has set at naught all of these former challenges," she asked the Commissioner to "please clear list my said claims or advise me what must be done to get them clear listed". In reply (Pl. Ex. 180; A. 199-

200) the Commissioner advised Mrs. Dere that Interior's records showed that the claims in question, the Lucy Agnes Nos. 1 and 2, "were declared null and void by this office on August 18, 1930, because of failure of the owners of the claims to file answer denying the charge that annual assessment work had not been performed on the claims for the year ending July 1, 1929, and that work had not been since resumed". Notwithstanding that the decision in the case was rendered upon the claimants' default, it was the Commissioner's unequivocal position that no action needed to be taken:

> In view of this holding of the Supreme Court, this office considers that it would be unnecessary to revoke its previous decision holding the Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the title arising from the location of the claims.[56]

Interior's understanding of the effect which the assessment work decisions possessed after the Department's pro-

56. The Lucy Agnes Nos. 1 and 2 were two of the claims on appeal in the *Union Oil* decision of April 1964. See 72 I.D. 313, at 325-326. The successors of Mrs. Dere therefore were among those to whom the legal conclusion of *Union Oil* was addressed, that a "failure" to take action to obtain a reversal of an assessment work decision elevated that decision to the rank of a conclusive and binding determination.

The obvious basis for the difference between the view expressed by the Commissioner to Mrs. Dere, that formal reconsideration of the assessment work decision was not necessary, and the action taken by the Department in the *Ahearn* case, pp. 30, 33, *supra*, where a request for advice as to the status of such a decision resulted in a formal revocation of the decision, was that in *Ahearn* the request for advice had been received after *Virginia-Colorado* but prior to the promulgation of the *Shale Oil* decision and that inasmuch as the *Ahearn* case had been individually reopened a formal individual disposition was required.

nouncement in the *Shale Oil* case (that they had no effect) and its view as to the action which a claim owner needed to take to free his claims from the shadow of those decisions (that he needed to take no action) are shown also in correspondence in 1936 between Commissioner Johnson of the General Land Office and Alexander Bowie, Esq., a lawyer in Grand Junction, Colorado, who inquired on behalf of an estate whether "any proceedings may be required . . . to reestablish record of its rights in [oil shale] claims" which had been declared null and void for failure to do assessment work (Pl. Ex. 182; A. 201). The Commissioner in reply (Pl. Ex. 183; A. 202) summarized the action taken by the Department in *Shale Oil* and concluded that "it is clear that a declaration holding a mining claim to be null and void because of failure to perform the annual assessment work is without effect and that the owner of the claim would still be entitled to resume work on the claim in the same manner as if no adverse decision had been made."[57]

Numerous other documents in the record show Interior's clear understanding that assessment work decisions were

57. The oil shale claims there in question had been the subject of three different assessment work contests, two of which ended in decisions which, like the decisions in Contests 11757, 11759 and 11761 involving the claims here, were default decisions in proceedings in which no answers were filed by the parties named in the contest complaints. This obviously had no bearing on Commissioner Johnson's conclusion that the decisions were "without effect." The third contest resulted in a decision against certain Phenol claims rendered after a hearing at which the evidence of the Government's witnesses as to the non-performance of assessment work was evidently not controverted. In that case the Commissioner's decision noted the contestees' right of appeal to the Secretary from his adverse decision. No such appeal appears to have been taken (Pl. Ex. 184, 185; A. 202-204). This likewise was immaterial.

to be held wholly without effect. *E.g.*, the Commissioner's letter of February 14, 1944, to Warren Paddock of DeBeque, Colorado (Pl. Ex. 196; A. 217-218), that a default assessment work decision of August 16, 1930, had been "rendered ineffective"; correspondence between W. Porter Nelson, of Denver, Colorado and the Department (Pl. Ex. 197-199; A. 218-222), in which Commissioner Johnson wrote that the *Shale Oil Company* decision had held that the adverse proceedings "based on charges of failure to do annual assessment work must be held as without authority of law and void"[58]; and the letter dated March 27, 1946, from Commissioner Johnson to lawyers in Grand Junction (Pl. Ex. 207; A. 229-231) in the course of which the Commissioner set forth the familiar statement that "the failure to do the assessment work could not be made the basis of a contest by the government, and that the failure did not work a forfeiture of the claims to the government, but only rendered them subject to loss through relocation by some other persons . . . ."

58. Some of those "void" decisions had been rendered on default, others after answer. The Commissioner's treatment of them as the same is further evidence that the procedural status of the assessment work cases was an immaterial factor.

3. The Void Character of Assessment Work Decisions Shown by the Knowing Issuance of Patents for Claims Declared Invalid on that Ground

A third way in which Interior showed by persistent practice its recognition that the consequence of the *Virginia-Colorado* decision and the Department pronouncement in the *Shale Oil Company* in 1935 was to deprive of all effect the assessment work decisions rendered in Department contests, was in the issuance after 1935 of patents for hundreds of oil shale claims that prior to 1935 had purportedly been declared null and void for nonperformance of assessment work. Plaintiffs' Exhibit 96, A. 148-157, is a tabulation of all oil shale patents issued in Colorado upon applications which were filed after the promulgation of the *Shale Oil Company* decision in 1935. It shows that, of 768 claims which were patented, 507 had been declared null and void solely on that charge. In terms of patent applications rather than individual claims, 71 of the 106 successful applications for patent[59] on Colorado oil shale claims which were filed after the *Shale Oil Company* decision involved one or more claims that had been declared null and void solely for nonperformance of assessment work. Plaintiffs' Exhibit 96, R. 1842, reprinted in reduced size on the opposite page, is a map which shows pictorially the information tabulated in Exhibit 95.

The record below contains a wealth of evidence which shows that these patents for claims which had been the subject of adverse assessment work decisions were issued with full knowledge of the fact of that history.[60] The evi-

59. The 71 are tabulated at A. 148-152; all 106 are listed at A. 152-157.

60. The Government brief to this Court, understandably, hardly notes the fact (". . . it would be impossible to deny that patents have been granted despite such cancellations," p. 64).

dence disposes of any possibility that the issuance of these patents constituted a kind of massive inadvertence of unparalleled scope and duration.

That the approval of claims for patent and the issuance of patent despite prior assessment work contest decisions purportedly invalidating the claims was consistent and avowed Interior practice over many years is shown in a variety of ways. For example, witness William Shafer, formerly Chief, Branch of Mining, in the Bureau of Land Management from 1955 to 1965 (A. 286), testified in a deposition that when he assumed his duties in Washington in 1955 he was instructed in several conferences with higher officials in the Bureau of Land Management and in the Solicitor's Office that "insofar as issuing patent [is concerned], if the charge of failure to do assessment work was the only charge, it was to be ignored, and had been ignored" (A. 298).

Numerous mineral examiners' reports on oil shale claims that went to patent explicitly noted the fact of prior contest decisions and indicated an awareness of their ineffectiveness. Thus, a mineral report (Pl. Ex. 119; A. 162-163) approved by J. Elliott Hall, Lands and Minerals Officer in the Colorado State Office,[61] notes both an administrative assessment work decision and also the later *Shale Oil* decision. The recommendation in the report that the claims be clearlisted and allowed to proceed to patent, which Hall had approved, was thereafter joined in also by the local Land Office, by the officials participating in issuance of Final Certificate, by the Minerals Staff Office in Washington, and by the Patent Office in Washing-

61. Hall testified in a deposition that it was his invariable practice to approve a mineral report only if he had read it and in fact approved it as reflecting the proper application of Interior policy to the facts of the case (A. 282).

ton. The patents themselves were issued in 1956 and 1957 (Pl. Ex. 120-123; A. 164-165; Pl. Ex. 124; R. 1892). In another example a 1958 memorandum to the Lands and Minerals Officer (Pl. Ex. 128; A. 175-176) summarized a 1927 investigation of the claims and assessment work proceedings in Contest 11749, stated that the adverse decision in that proceeding was "of no avail and did not affect the status of the claims." In a memorandum of December 30, 1958, the acting Land Office Manager forwarded the application to Washington for "consideration and issuance of patent, if in order" noting that apart from some question of a stock-raising homestead entry "there are no other conflicts" (Pl. Ex. 130; A. 177-178). Patent issued January 9, 1959 (Pl. Ex. 131; R. 1906).

Other examples abound. A February 27, 1958, Mineral Work Sheet on application C-020379 contains the notation "Contest 12261 involved failure to do assessment work and is immaterial" (Pl. Ex. 135; A. 182), and in the same case Manager Andrus of the Colorado Land Office stated in forwarding the application for issuance of patent that contest 12261 "is not considered as a bar to issuance of patent in the subject case" (Pl. Ex. 136; A. 183). Another report, of November 21, 1955 (Pl. Ex. 138; A. 185), noted that an adverse contest decision on assessment work grounds "was overruled by the Departmental Decision on June 24, 1935, 55 L.D. 287, which held [in view of *Virginia-Colorado*] that the Department of Interior had no authority to declare a claim void for lack of performance of annual assessment work." The Director of the Bureau of Land Management in a memorandum dated February 23, 1960, referred to patents issued on 30 oil shale claims: "The claims were subsequently contested and declared null and void for non-performance of assessment work. This

declaration of invalidity had no effect and did not proscribe subsequent issuance of patent" (Pl. Ex. 154-A; A. 192).

In addition to direct references to assessment work decisions which appear in the files of patent applications for oil shale claims the evidence shows (1) that the assessment work decisions were generally recorded on the tract books or the special oil shale plat books maintained in Washington, and frequently in both places (A. 294-295; Def. Ex. R-R; R. 8585); (2) that recourse to these books during the processing of oil shale patent appplications was required (see 43 C.F.R. § 1813.1-1(b) (1967): "...it is... necessary that notations be made on the tract books and plats of all applications and entries of public land ... in order that the status of a tract may be readily ascertained"); and (3) that officials who were personally familiar with the assessment work decisions had large roles in the subsequent patenting of oil shale claims attacked on that ground.

For an example of the last point, Clarence R. Bradshaw, an attorney who had been with the Land Office since 1921 and who was Chief of the Branch of Adjudication of the Land Office from 1947 through 1951 (Pl. Ex. 306; A. 273-274), continued to take an active part in considering oil shale applications throughout the 1950's (Deposition of William L. Shafer, A. 298, 303). He had served as an investigator in the field during the assessment work campaign (Pl. Ex. 283, R. 4581-82, is an adverse field report which Bradshaw prepared in 1931 in Denver) and thereafter worked in Interior's Washington Office and was familiar with the *Shale Oil* decision.[62] It was he who adju-

62. His surname or initials appear on many documents evidencing the application of the decision. See *e.g.*, Pl. Ex. 72, 175, 180, 183, 198, 199, 207, 215; A. 125, 194, 199, 201, 219, 221, 229, 239, which

dicated the third and fourth patent applications (see Pl. Ex. 95; A. 148) which resulted in the issuance after *Shale Oil* of patents on claims that had been purportedly declared invalid in assessment work decisions prior to that case. Bradshaw was well aware, in processing the applications to patent, of those prior adverse assessment work decisions.[63]

It was the same Clarence Bradshaw, who, as Associate Solicitor for Public Lands, thus spoke from an unrivaled personal acquaintance with the matter when he replied in 1959 to the first suggestion from the Denver Regional Solicitor's office that old assessment work decisions should be made the basis of pleas of *res judicata* to bar pending patent applications:

> You raise the question whether under the doctrine of *res judicata,* those claimants who failed to appeal from the Commissioner's decisions or resort to the courts where a departmental decision was concerned, now are foreclosed from asserting any rights under their locations notwithstanding later Supreme Court decisions (*Wilbur* v. *Krushnic,* 280 U.S. 306 and *Ickes* v. *Development Corporation,* 295 U. S. 639), holding that the Government was not concerned in a claimholder's failure to do the

are documents ranging in date from July 17, 1935, to December 3, 1959. "Surnaming" a document, which generally involved entering a surname or initials in the upper right corner of a file copy of the document, was a practice of long standing in Interior the purpose of which was to record the identity of each person who "had read and approved [the document for] signature," and as "a notification to your superior that you had reviewed and agreed with the contents ..." (Deposition of William L. Shafer, A. 291-294).

63. The work check forms in these two cases (Pl. Ex. 295, 296; R. 4653-54) were prepared by Bradshaw in 1949, who noted on each that the tract books showed no conflicts. The tract book pages (Pl. Ex. 102, 103, 105; R. 1860, 1861 and 1863) showed that the claims had been declared null and void.

assessment work and that it could not declare a forfeiture of a claim because of such failure.

In view of the Supreme Court decisions mentioned, the Department in its decision of June 24, 1935, in the *Shale Oil Company* case (55 I.D. 287) held that in that case the Commissioner's decision was without authority of law and void; recalled and vacated certain cited departmental decisions and the departmental instructions of June 17, 1930 (53 I.D. 131); and overruled "other departmental decisions in conflict with this decision." Thus in effect the decision of June 24, 1935, recalled and vacated *all* departmental decisions declaring oil shale placer claims null and void solely for failure of the claim owner to do the assessment work, thus leaving the claims as if they never had been contested (Pl. Ex. 215; A. 238-239; emphasis in the original).

The Regional Solicitor in turn promptly advised the Colorado State Supervisor by letter dated December 11, 1959 (Pl. Ex. 156; A. 192) that "it is the position of the Department that the decisions of the Commissioner of the General Land Office involved herein were void and of no effect in this connection, were subsequently withdrawn and, as a result, the plea of previous judgment or *res judicata* is not to be applied in these or similar [oil shale] cases."

Interior's Change of Position

In August 1961 the Regional Solicitor's Office addressed Mr. Bradshaw's successor with the renewed suggestion that the assessment work decisions provided a basis for insisting upon the invalidity of oil shale claims. In doing so it stated "We recognize that it has been the custom of the Bureau of Land Management to ignore the effect

of these decisions in adjudicating oil shale patent applications" (Pl. Ex. 157; A. 194). On September 22, 1961, the Solicitor's Office authorized the Regional Solicitor to advise the Colorado State Director to dismiss pending patent applications on the ground of the assessment work contest decisions (Pl. Ex. 218; A. 241).[64]

The Land Office Manager implemented the Solicitor's views in eighteen substantially identical decisions issued in February 1962.[65] On appeal, in consolidated proceedings decided under the title, *Union Oil Company of California*, 71 I.D. 169 (1964), the legal position which the Solicitor's Office had advised the Land Office Manager to adopt in the decisions appealed from was affirmed.[66]

The claims in suit were not involved in *Union Oil*, and indeed have not been before the Department since the 1931 decisions of which review is sought. It was, however, obvious that after *Union Oil* judicial relief from those 1931 decisions was now required. This action to obtain that relief was therefore promptly commenced.

The plaintiffs advanced three distinct grounds for relief in the District Court going to the merits of the 1928-1931 decisions, and a fourth ground for relief based on the procedural irregularities of the proceedings. The plaintiffs

64. The course thus directed, that of simply dismissing the applications, of course gave the patent applicants no notice of or opportunity to meet the charge.

65. The Solicitor's position was conveyed by the Denver Regional Solicitor (Pl. Ex. 219; A. 242).

66. The documents in the record in this action which show the circumstances of the Department's change of position were obtained pursuant to Rule 34 only over the Government's vigorous objection. The assertion of executive privilege was overruled by the District Court after *in camera* inspection of the documents. At the time of the events themselves, the parties involved in the decisions of the Land Office Manager in 1962 took appeals under the Department's procedures unaware that the matter had already been considered.

asserted (see App. 32) that the decisions were invalid and of no consequence

(a) because the Secretary lacked the fundamental power—subject matter jurisdiction—to render them, and hence they were void;

(b) because, even if the Secretary possessed the subject matter jurisdiction to render them, they were wrongly decided and are therefore now subject to direct judicial review and reversal; and

(c) because, whether or not the decisions were void or wrong, the Secretary in 1935 had administratively set them aside and established and thereafter maintained a consistent administrative policy that they and other similar decisions were to be treated in all respects as nullities, a policy from which the Secretary could not *retroactively* depart to the prejudice of the paintiffs (whatever might be his power *prospectively*).

The fourth ground on which the plaintiffs relied was that, upon the basis of principles announced by the Secretary himself, it was indisputable that the administrative proceedings in which the decisions had been rendered were substantially defective for failure to obtain personal jurisdiction over the then owners of interests in the claims.

The Government's answer raised the affirmative defenses of laches and estoppel (App. 22), upon which, however, it offered no proof and which in effect it abandoned.[67]

67. The laches defense of course asserted reliance. The Government's answers to interrogatories, however, admitted that there had been none (Pl. Exs. 313, 314; A. 305-312). In its post-trial brief to the District Court, the Government confirmed that point and indeed went the further step of asserting that it did not even contend that the Department *knew* of the decisions (Brief for Defendant, pp. 59-60).

After trial upon an extensive record[68] the District Court gave judgment for the plaintiffs but ruled explicitly only upon the first ground advanced, that the 1928-1931 decisions were void for lack of the fundamental power to render them. Its opinion appears at pp. 26-47 of the Appendix. The Court of Appeals unanimously affirmed, essentially on the same ground (App. 434-446). The opinions of both Courts, however, show a recognition of the failure of the laches defense and acknowledge the elaborate evidence of the Department's long-standing administrative practice (App. 42-45, 47; 441, 445).

Summary of Argument

I

The fundamental question presented to the courts below was whether administrative decisions rendered by the Department of the Interior in the period 1928-1931 which purported to cancel the oil shale claims in suit for nonperformance for one year of annual assessment work should be set aside on direct judicial review. That the old decisions were final adjudications which when rendered were subject to judicial review is established both by explicit concession in the Department's *Union Oil* decision and by a consideration of the Department's adjudicatory practice at the time.

The extensive record establishes clearly that the Government's pleaded defense of laches cannot be sustained to bar direct judicial review. In its answers to interroga-

68. The record in the case as paginated by the clerk of the District Court comprises some 9,000 pages, much of it introduced by the Government.

tories and concessions in its post-trial brief to the District Court, the Government has admitted that there has been no element of reliance on the supposed effectiveness of the old decisions. On the contrary the evidence shows, as the plaintiffs urged in the courts below, that from the time of this Court's decision in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, in 1935 until the present controversy arose, the Department, giving effect to this Court's pronouncement, had itself deprived the old decisions of effect and otherwise administered oil shale lands, in every context in which the question arose, upon the basis that those decisions were themselves nullities.

These circumstances establish that if the old decisions were merely erroneous, they were correctly set aside below, whether or not the Secretary lacked, as the courts below found he lacked, subject matter jurisdiction to render the old decisions. That such decisions *were* erroneous was the explicit holding of this Court on two prior occasions, *Wilbur* v. *Krushnic*, 280 U. S. 306; *Ickes* v. *Virginia-Colorado Development Corp.*, *supra*. Those two decisions, both unanimous, carefully canvassed and rejected the substance of the arguments now raised by the Government.

The conclusions expressed in the two prior opinions of this Court were correct. Under the basic mining laws, which govern the validity of the claims in suit, the Government concededly had no interest in the performance of assessment work. There was not, contrary to the Government's contention here (repeating the contention made to this Court in *Krushnic*), any line of authority establishing such an interest as to land covered by withdrawals. Nor did the Mineral Leasing Act create such an interest. The language of the statute is inapt for that purpose; had Congress intended such a result statutory precedent lay

ready at hand. The very theory upon which Congressional interest in oil shale was expressed, that its potential value to the country required time-consuming and expensive research and process development, is directly at war with any notion that it was the legislative intention that claims on which largely meaningless assessment work was not continuously performed should be forfeited, for that would have removed the incentive, which the prospect of production from owned reserves held out, for the very investment and effort needed to bring the benefits of the resource to the country. The Government's argument as to the intention of the Congress is, moreover, flatly in contradiction to the contemporaneous statements of members of the Congress responsible for the legislation.

II

The controversy over assessment work on oil shale claims which lasted from the mid-1920's, when the Department insisted upon its right to challenge oil shale claims for non-performance of assessment work, through the Department's promulgation in 1935 of *The Shale Oil Company* decision, acknowledging, after this Court's two decisions, that the Department had no authority to challenge claims on that ground and that its decisions purporting to cancel claims for that reason were themselves without effect, was in explicit terms a controversy over the subject matter jurisdiction of the Department. That characterization of the issue appeared in the Department's decision in *Emil L. Krushnic (On Rehearing)*, 52 L.D. 295, 306 (1928), and was reiterated in Secretary Wilbur's explanation to the Congress in 1931 that what the resumed campaign after the decision of this Court in *Krushnic* was intended to test was "the authority (if any)" left to the

Department by that decision. Most conspicuously of all, the second decision in this Court in *Virginia-Colorado* was in terms a ruling, not that the Department had merely committed an error of law, but rather that the Department's challenge on the assessment work ground and its adverse proceedings, as well as its decisions, were "without authority." The Government's argument to the Court in that case had rested upon a theory that required a decision in jurisdictional term, and the Court's opinion was responsive.

The decision was moreover correct in holding that the Secretary lacked authority or subject matter jurisdiction. The Secretary's adjudicatory function is implied by necessity to permit him to act effectively where the statute creates rights or duties he is obliged to protect. Numerous cases in this Court support that principle, including the leading case of *Cameron* v. *United States*, 252 U. S. 450, relied on by the Government here (as it was in both *Krushnic* and *Virginia-Colorado*). The performance of assessment work is not related to any such statutory right or duty imposed upon the Secretary, and he therefore lacks authority to pursue the subject. That there is in fact no conflict in doctrine is evidenced also by the circumstance that Mr. Justice Van Devanter, the author of the opinion for the unanimous Court in *Cameron*, was a participant in the likewise unanimous decisions in *Krushnic* and *Virginia-Colorado*.

III

A decision in this case which called in question the prior unanimous decisions in *Krushnic* and *Virginia-Colorado* would ignore more than a quarter-century of legislative history showing Congressional acceptance of the result

announced and a building upon it. It would also overthrow established administrative policy established by Secretary Ickes in 1935 and consistently adhered to by his successors until, in 1964, the Department in its *Union Oil* decision confirmed a departure from it. The Government points to stability of law, and the particular force of that consideration in the context of title to land, as the touchstone: the weight of that consideration bears heavily in favor of an adherence to the prior decisions of this Court, which have been followed and applied for thirty years and which involve only a question of statutory construction, not any point of constitutional dimension. *Cf. Erie R.R.* v. *Tompkins,* 304 U. S. 64, 77. Moreover, the Congress now has under active consideration the extensive revision of the public land laws, including the mining laws with their provision for assessment work. There is thus no occasion for the Court to intrude upon the subject out of any conviction that it will otherwise be ignored.

ARGUMENT

POINT I

The 1928-1931 assessment work decisions were final administrative decisions which are now properly before the Court on direct review, for the asserted defense of laches has in substance been abandoned and is, in any event, wholly unsupported in the extensive record; the unanimous decisions of this Court in *Krushnic* and *Virginia-Colorado* twice set aside similar administrative decisions and correctly held that nonperformance of annual assessment work on oil shale claims did not forfeit the claims to the United States.

Both the District Court and the Court of Appeals held that the plaintiffs were entitled to judicial relief from the 1928-1931 administrative assessment work decisions here in suit. The explicit basis for that conclusion in each court was that the Secretary lacked the fundamental power or subject matter jurisdiction to render them, and hence they were void and could provide no basis now for a holding that the claims in suit were invalid. On that reasoning the District Court granted, and the Court of Appeals affirmed, a judgment declaring the decisions to be without force or effect and enjoining the Secretary from asserting their validity (A. 48-51). The Government does not, of course, dispute the conclusion reached by the courts below, given the premise. Rather it argues that the prior decisions of this Court in *Wilbur* v. *Krushnic*, 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, followed by the courts below, are not to be read as denying the Secretary's subject matter juris-

diction. The deficiencies in this aspect of the Government's argument are the subject of Point II of this brief (pp. 94-107).

The Government deals with the question of subject-matter jurisdiction as the principal point in its argument, as if to suggest that it is the dispositive question before the Court. That could not possibly be true unless the only review now available of the 1928-1931 decisions were collateral.[69] Inasmuch as this case presents *only* a question of direct review, it will be obvious that the question of subject-matter jurisdiction *vel non* is not the crux of the case—however clear it is, as we show in Point II, that the Secretary did lack such authority. On direct review the prior decisions should of course be set aside if merely erroneous, whether or not they suffer from the more fundamental deficiency that they were rendered by a tribunal which lacked power to do so (or were rendered in the absence of personal jurisdiction over necessary parties). The Government does not dispute that the case presents a question of direct review, but except for a two-line footnote (note 20 on page 47), its brief is devoted to the question of review "in collateral proceedings" (p. 47). Because of the possible confusion thus engendered, it appears necessary first to summarize briefly the actual procedural posture of this case.

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69. In fact, even acceptance of the Government's labored argument that the Secretary possessed subject matter jurisdiction to render the decisions would not free them from collateral attack, were it material to consider whether they were subject to collateral attack. Quite apart from the issue of subject-matter jurisdiction, the 1928-1931 decisions were substantially defective for failure to obtain personal jurisdiction of then owners of substantial interests in the claims (see pp. 118-119, below). As the Government's brief necessarily concedes, "defect of process" is one of the circumstances in which administrative action is "subject to being ignored or to collateral attack" (p. 28).

Inasmuch as the case thus presents a question of direct review, the central question is whether the 1928-1931 decisions were infected with legal error. Whether that question be considered on principle or on authority, it must be given an affirmative answer. The prior decisions of this Court in *Krushnic* and *Virginia-Colorado,* in disposing of contentions markedly similar to those now advanced by the Government in arguing that *Virginia-Colorado* should be overruled, twice set aside assessment work decisions indistinguishable from the decisions here. In principle, those decisions were right, for oil shale mining claimants had no such obligation vis-a-vis the United States to perform annual assessment work as to forfeit their claims for failure to perform it. As the plaintiffs argued as an alternative ground for decision below, the 1928-1931 decisions should be set aside because erroneous. The decisions below were rightly decided, and upon familiar principles the judgment below should be affirmed here, if on any ground presented it is sustained.[70]

A. The 1928-1931 decisions were administratively final decisions subject to direct judicial review when rendered, and they remain subject to such direct review, for the pleaded defense of laches is without support and has in substance been abandoned.

That the 1928-1931 decisions were administratively final decisions subject to judicial review without need for further recourse to administrative procedures was conceded in the Solicitor's *Union Oil* decision. There, in considering the courses of action open to oil shale claimants

70. See *Helvering* v. *Gowran,* 302 U. S. 238, 245; *United States* v. *American Ry. Exp. Co.,* 265 U. S. 425, 435.

involved in administrative assessment work decisions similar to those here, the opinion stated (71 I. D. at 180-181; A. 367):

> . . . we do not question that the appellants or their predecessors in interest could have invoked judicial review of the Department's decision under applicable precedent, even though the time within which the claimants could have appealed to the Secretary had expired. The claimants, following the decision in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* had at least two alternatives open to them to protect their claims. They could have petitioned the Secretary to exercise his supervisory authority to recall and vacate the Land Commissioner's cancellation of the claim as he had done in *The Shale Oil Company, supra,* or they could have sought relief in the courts in proper proceedings instituted for that purpose. . . . (footnotes omitted)

No doubt in recognition of the point, the defense of a failure to exhaust administrative remedies, raised by motion in advance of answer (A. 16) and denied by the District Court (235 F. Supp. 606), has not been further pursued by the Government.[71]

What was conceded in the *Union Oil* decision is equally compelled by a consideration of the procedures which governed the old contests. In summary, what the applicable Department rules envisaged was a procedure in which (1) the Department decided the general point of law, (2) a contest complaint was thereafter issued asserting facts which if established would bring into play the legal rule already adopted, and (3) the claimant upon whom the contest complaint was served might, by appearing and offering evidence at a hearing, controvert the

71. It did not brief the point in the Court of Appeals.

facts if he chose to do so, but if he did not, the rules provided that his failure would constitute an admission of their truth, obviating the need for a hearing.[72] Appeals were appeals on the facts, and where there was no factual controversy there was obviously no need for an appeal, and the rules explicitly provided that in such a case no appeal within the Department would lie.[73] The Commissioner's decision in any case in which the contestees preferred not to contest the facts thus constituted a final administrative decision immediately reviewable in the courts on the question of law involved, although of course not on any question of fact which on this procedure had been conceded for purposes of the case.

The course of action contemplated by the Department's rules was precisely what was done in the proceedings here. Thus, in the post-*Krushnic* phase, first came the general instructions to challenge all claims on which assessment work was in default and had not been resumed.[74] Then, when the field investigators reported back on June 23,

72. See Circular 460, *Proceedings Upon Reports of Special Agents* (that is, Government contests), 44 L. D. 572 (1919), paragraphs 7-9 and 11-14, supplemented by the more general Rules of Practice, which as promulgated in 1926 (51 L. D. 547) were in effect throughout the period of controversy. This sharp distinction between the Department's determination of the law and the ascertainment of facts in a contested proceeding in the General Land Office was succinctly summarized by Mr. Justice Brandeis in *West* v. *Standard Oil Co.*, 278 U. S. 200, 207.

73. Rules 49 and 75 of the *Rules of Practice*, 51 L. D. at 556, 560 (1926), 43 C.F.R. §221.49, §221.75 (1949).

74. The original instructions to the field were those from the Secretary and the Commissioner of January 15, 1930 (Pl. Ex. 16; A. 70-71), followed by instructions in April 1930 that posting of challenges should be made promptly "to be followed by the direction of adverse proceedings by this office, in the usual way...." (Pl. Ex. 18; A. 72-74). See, also, *Instructions, Government Proceedings Against Oil Shale Claims for Default in Assessment Work*, 53 I. D. 131 (1930).

1930 that assessment work had not been resumed on the claims in suit (Pl. Ex. 27; R. 1600), contest notices were promptly sent out. The decisions of the Commissioner in 1931, after defaults in appearance, thus constituted final administrative adjudications[75] and were, as the *Union Oil* decision concedes, then subject to judicial review.

Not only were the 1928-1931 decisions final adjudications subject to judicial review when rendered. They remain subject to judicial scrutiny on direct review. As the Government conceded in the District Court (A. 61), no statute of limitations fixes the time within which judicial review of an administrative decision of the Department must be sought. On the other hand, the Government's answer (A. 22) asserted the defense of laches, alleging that after the assessment work decisions the United States, "relying upon the established invalidity of the claims, entered into oil and gas leases covering much of the area involved and otherwise administered the property as being free and clear of plaintiffs' claims." The difficulty with the laches defense was not, as would have been true of a defense of the statute of limitations, that it is not available as a matter of law. The difficulty, equally formidable, is that there is not a shred of evidence to support it. As the Court of Appeals stated: "It is not a question of laches . . ." (A. 445). Judge Doyle in the District Court had made essentially the same point when he found that "there is a dearth of evidence to establish acquiescence, express or implied, in any assumption of jurisdiction by the Department" (A. 47).

There has of course been no dispute between the parties that laches will bar an assertion of rights only if there is

75. In recognition that no further administrative appeals were available, the Commissioner's decisions recited that "The case is closed" (Pl. Ex. 32, 34 and 36; A. 83, 84, 86).

some causal connection between an assertion of the right and subsequent action taken by the person asserting the defense. *Costello* v. *United States*, 365 U. S. 265, 282 ("Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense"); *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206, 215; *Northern Pac. Ry.* v. *Boyd*, 228 U. S. 482. The defendant's answer, indeed, is phrased in recognition of these indispensable elements of unwarranted delay, causality and prejudice. Far from establishing those elements, however, the history of the administration by the Department of oil shale claims as reflected in the record before this Court shows with unmistakable clarity that the Department's consistent view was that the claims supposedly cancelled by the old decisions, like those rendered here, were to be treated as if those decisions had never been rendered. So far from *relying* on the effectiveness of the decisions, as its answer asserted, the Department has acted in every context in which the question arose from precisely the opposite view of the decisions: that they had no effect whatever. This view reflected the Department's understanding that, as this Court had twice ruled, the United States had no concern with the performance of assessment work, that the Department had exceeded its statutory powers in inquiring whether such work had been performed, that the purported cancellations of oil shale claims for non-performance of assessment work were themselves void, and that, after the decisions of this Court, the Department had by general administrative action itself rendered the prior decisions ineffective. Evidencing this view, the Department informed the public and the Congress that the decisions were nullities, it sought legislation upon the premise that

the decisions were wholly nugatory,[76] and, as noted, it has issued patents over a period of a quarter century covering claims against which it knew assessment work decisions had been rendered. Only since the Department's about-face after 1960 has any different view of the decisions been taken.[77]

That there is no evidentiary basis for a laches defense is established not only by the many individual items of evidence in the record, which affirmatively show that no one believed the assessment work decisions were effective, let alone relied upon their effectiveness, but also by the answers given by the Government to interrogatories directed to the particulars, if any, of the matters in which, as asserted in the answer, the Government "in reliance" upon the invalidity of the decisions had done anything in administering the lands.[78] The answers established that the Government had no evidence whatever that any oil or gas leases had been issued in such reliance; they stated that it was "impossible to establish" that any grazing privileges had issued in such reliance; that the Govern-

76. See pp. 110-112, below, as to post-1935 legislative history.

77. Whatever may have been the Government's initial reluctance to admit the change of position, the evidence leaves it wholly clear that that is precisely what occurred. Pl. Ex. 211; R. 2087-2098, for example, is a stipulation between counsel as to the admissibility of two letters written in 1963 by the then Assistant Secretary for Public Land Management to Sen. Clinton Anderson, in which (see A. 235-237) the Secretary stated unequivocally that until 1958 no question was raised as to the point that the *Shale Oil Company* decision in 1935 had effectively obliterated the assessment work decisions. The stipulation itself states that the matters referred to in the letters fell within the jurisdiction of the Assistant Secretary for Public Land Management and that he was generally familiar with them (R. 2088).

78. The Interrogatories and answers in this action in the District Court appear as Pl. Ex. 313; A. 305-310, R. 945. Largely similar interrogatories were propounded in the *Brown* case. Those interrogatories and the answers appear as Pl. Ex. 314; A. 310-312, R. 945.

ment in fact did not know whether the United States had in any respect ever administered the lands as being free and clear of the claims, and that the Government had no information that any third parties had ever acted in reliance upon the invalidity of the claims. In its post-trial brief to the District Court, the Government explicitly abandoned any contention that "administration of the lands was affected by any particular reliance on the earlier decisions" (Brief for Defendant, p. 60). While it has not in terms abandoned the laches defense, the Government has conceded that the record establishes conclusively that there is no basis upon which such a defense could be sustained.

The concept of laches rests of course on the notion of unwarranted delay. The very suggestion of a supposed "delay" in the asserted "failure" of the plaintiffs or their predecessors to seek earlier relief from the assessment work decisions has an Alice-In-Wonderland quality about it. The voluminously documented record suggests, quite to the contrary, that had relief been sought at any time after the *Shale Oil Company* decision in 1935, the plaintiffs would have faced substantial obstacles. It is quite unclear that the plaintiffs could then have shown the existence of any actual controversy of which a court could take jurisdiction, or that they could show that the relief requested had not already been granted in substance.[79] See *Brownlow v. Schwartz*, 261 U. S. 216.

79. The Department itself took the position that relief had already been granted, and that as one claimant was advised, "it would be unnecessary to revoke" a previous assessment work decision as it was "without authority of law . . . [and] without any effect on the title arising from the location of the claims" (Pl. Ex. 180; A. 199-200).

B. In its decisions in *Krushnic* and *Virginia-Colorado* this Court twice rejected the arguments now urged by the Government and set aside assessment work decisions indistinguishable from the 1928-1931 decisions here.

The basic legal issue presented in the Department's campaign to declare oil shale claims invalid for failure to perform annual assessment work was whether, and if so, in what circumstances, an oil shale claim was or could be forfeited to the United States because of such a default. That question was twice before this Court a generation ago. The Court of Appeals indeed made explicit its view that the Government's contentions now were simply the long-delayed echo of an argument twice made and rejected.[80] In its brief in the Court of Appeals the Government, naturally, did not urge a direct departure from this Court's previous decisions. That overt step it now takes here, urging in Point II of its brief that the *Virginia-Colorado* decision be "limited" (on reasoning conceded by the Government to be "tortuous", p. 47)[81] or overruled. In advancing the argument that the decision be overruled, the Government does not add anything new or material to the considerations before the Court on the previous occasion. The Government seeks, however, to avoid the full force of history by insisting that the *Virginia-Colorado* decision alone be revisited (Brief, p. 48, note 21). As will appear, however, the significance of that decision can be under-

80. "These cases on appeal are like a voice out of the past with mining locations dating from 1918, with the clearly established legal propositions directly applicable to them and the matter thought to be at rest. . . ." (A. 445)

81. The Government is properly hesitant in suggesting that the decision can be limited, for the facts by which it would circumscribe the decision were not significant in either the reasoning or the result. See p. 96 n. 123, below.

stood only in the light of the earlier decision in *Krushnic*. We therefore first consider the relationship between the two decisions, before turning to the factors which would make any departure from them inappropriate and unsound.

Although the Government now presses the view that the two cases have no necessary relation, the summary of the Government's argument to this Court in *Virginia-Colorado* took as its starting point a definition of the question presented as "the precise question which was reserved in *Wilbur* v. *Krushnic*" (Brief for the Petitioner, p. 5). Government counsel there saw what Government counsel here denies. In consequence of that error, the Government makes another in arguing that in *Virginia-Colorado* this Court in its decision, and the Department of Justice in its argument, both "assumed"—and wrongly—that a mining claim "could not be challenged by the United States under any circumstances for reason of failure to do the required annual labor" (Brief, pp. 48-49). What the Government here takes to have been airily and negligently *assumed*, had in fact been squarely *decided* in *Krushnic*, and decided adversely to the Government. The Government's argument here (Brief, pp. 49-57) differs hardly even in detail from the Department's reasoning in the *Krushnic* case and the argument by the Government in this Court in support of that decision, all of which this Court there considered and rejected as error.

The question raised in *Krushnic* was whether non-performance of assessment work on a claim for a leasing act mineral, valid when the Mineral Leasing Act went into effect, caused a forfeiture of the claim. The rationale of the Department's view that non-performance did forfeit the claim is set forth in clear terms in the first Departmental decision by First Assistant Secretary Finney:

"[The assessment work charge] is founded upon the doctrine that in view of the provisions of section 2324, Revised Statutes, requiring the performance of annual assessment work, and the excepting clause in section 37 of the leasing act, a valid mining location made for any of the minerals specified in said act and unperfected at the date thereof by a certificate of entry can not be perfected, but is forfeited upon failure to fulfill the statutory requirement as to annual labor and improvements, and the land therein becomes subject to disposition under the leasing act.

• • •

"Section 37 of the leasing act affords notice to all persons interested in mineral locations containing the minerals mentioned therein of the conditions under which they may maintain their claims and protect the deposits claimed from its operation. There is no warrant for reading into its saving clauses the statutory provision as to resumption of work of the original locator before hostile entry by another. This seems clear when such provision is considered in connection with its context.

• • •

"It is plain that the provision relating to the resumption of work is a restriction imposed upon the right of relocation. It applies only to claims that could be relocated but for the resumption of work. It has no application to lands no longer subject to relocation, or to the operation of the general mining laws, but withdrawn from such operation and subject to other disposition for a public purpose. The defaulting claimant can not restore a lost estate in such lands by resuming annual labor and improvements at a later time." (52 L.D. at 285-87)

For support for the crucial holding that a forfeiture occurs "upon failure to fulfill the statutory requirement as to annual labor" (52 L. D. at 286) Finney relied upon *Cronberg* v. *Hazlett*, 51 L. D. (1924), and *Interstate Oil Corporation and Frank O. Chittenden*, 50 L. D. 262 (1925), two of his own prior decisions as First Assistant Secretary.[82] Those two decisions are instructive upon the Government's argument here, for each of them represented an expression of the theory that a withdrawal under the Pickett Act (in *Interstate*) and the Mineral Leasing Act (in *Cronberg*) operated to work an automatic forfeiture of a previously located claim upon a default in the performance of assessment work.[83] In Finney's words in *Interstate*, a consideration of the savings clause in the Pickett Act (Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 142)

> compels the conclusion that the withdrawal in question was intended to be of a continuing nature and to attach immediately upon the default of any person having at the time of its inception a then subsisting and valid claim. (50 L.D. at 266)

82. They, together with two other Finney decisions of the same era, *United States* v. *Ruddock et al.*, 52 L.D. 313 (1927), and *Standard Shales Products Co.*, 52 L.D. 522 (1928), are principal bulwarks of the Government's argument to this Court (Brief, pp. 55-56). Not only were all four of common authorship, but *Standard Shales* was decided explicitly upon the basis that the Commissioner's view there, which Finney reversed, "is not in harmony" with what was said in *Interstate* and *Krushnic*, 52 L.D. at 524. In short, the several citations do not represent independent consideration of the point, but rather reiteration of the same point by the same spokesman.

83. Neither decision thus has any bearing on the specific question considered in *Virginia-Colorado*—whether the Government acquired any rights by posing as a rival locator which it did not automatically get upon default in the work. There was thus no occasion to cite them in *Virginia-Colorado*.

In *Cronberg* he construed Section 37 of the Mineral Leasing Act as making it "clear that Congress intended that [a claim] . . . should be forfeited to the United States in the event of a failure of such claimants after the date of the act to fulfill the requirements [as to assessment work]" (51 L. D. at 106-07), a view which Finney noted was "in harmony with" his prior opinion in *Interstate*.[84]

These decisions were cited and relied upon not only by First Assistant Secretary Finney in his *Krushnic* decision, but they, together with *E. C. Kinney*, 44 L. D. 580 (1916),[85] were heavily relied on by Secretary Work in his lengthy opinion on rehearing in the *Krushnic* case, 52 L. D. 295, 306, an opinion which canvassed in detail the substance of every contention of law and policy now urged upon this Court by the Government. These decisions were also cited in the Government's brief to this Court in *Krushnic* (Brief for the Petitioner, pp. 15, 18, 19, 33).

It is of course too plain for dispute that those arguments mounted by Secretary Work, in sustaining Finney's conclusion, were the direct focus of this Court's attention in *Krushnic*. There is no suggestion, and no basis for one, that this Court ignored or failed to consider these points, and the fact that the printed summary of the Government's argument carries the citations of the three cases above discussed (see 280 U. S. at 308) is additional evidence that the Department's rationale received careful attention. Given the tenor of this Court's decision in

84. And very similar to the point urged at pages 57-63 of the Government's brief. Indeed, the Government brief (p. 9) argues explicitly that the "solution . . . accepted by Congress in 1910" in the savings clause in the Pickett Act "was carried forward into the [Mineral Leasing Act]," which is Finney's rationale.

85. Likewise cited by the Government here (Brief, p. 52).

Krushnic it necessarily rejected not only the result reached by the Department, but the reasoning which underlay it, as well. That conclusion, to which a consideration of this Court's decision alone would point, is reinforced by the further fact that, after this Court's decision, the Department overruled both *E. C. Kinney* and the *Interstate* decision, so far as in conflict with this Court's decision. 53 L. D. 228, 230. Secretary Wilbur there stated that the "reasons" expressed in those cases

> both of which were relied upon by the Government in the *Krushnic* case, are clearly incompatible with the Supreme Court's opinion therein, and therefore cannot be any longer regarded as precedents and should not be followed.

Secretary Wilbur is thus himself a witness that there is no force in the Government's present suggestion that *Virginia-Colorado* was based on a crucial mis-assumption. On the contrary, it followed from an explicit decision by this Court in *Krushnic* rejecting the contentions which the Government here strives to suggest present questions of first impression.

What was left for decision in *Virginia-Colorado* was thus a narrow question, indeed. It was simply the point whether the result announced in *Krushnic* would be affected if, instead of relying on the default in assessment work itself, the Department moved affirmatively to post the claims and file charges during a hiatus in the performance of the work. Though not the same acts which a private relocator would perform,[86] the new procedures

86. Under the statute a relocation is nothing but an original location made on ground previously embraced within a prior located claim. For a placer claim, the "relocator" would thus proceed among other steps to record a certificate of location, something the Depart-

reflected the Secretary's determination "to test out the extent of the authority (if any) left to us by the Supreme Court decision" in *Krushnic* (Pl. Ex. 47; A. 96). That the Secretary should have lacked confidence in the result to be expected from the new procedures is understandable: when the claimant in *Krushnic* had suggested that the Department ought to have to behave like a rival locator, the contention had been summarily rejected as "not supported by any authority in point nor can the reasoning be accepted as sound." 52 L.D. at 285.

Contrary to the implications of the Government's argument here, the same policy considerations were presented again to the Court in *Virginia-Colorado* as had been urged in *Krushnic*. Indeed, the Government's argument about the "practical effects" to be expected from a decision adverse to the Government, as made in its brief in *Virginia-Colorado* (pp. 15-16), largely repeated the argument made in the *Krushnic* brief (pp. 35-36, 38-39), and that in turn reflected the points urged by the Secretary in his opinion on reargument in *Krushnic* (see 52 L.D. at 306-307).[87] On the legal point presented, however, the Government's effort was to distinguish the *Krushnic* case, not to attack it frontally. To have raised again, as the Government's brief here suggests it somehow inadvertently or carelessly failed to do, the authorities discredited by *Krushnic*[88] would of course have served only to underscore

ment never did do. On the other hand, the private relocator would not initiate a litigation in the Department to test his right to relocate by virtue of a default in assessment work on the prior claim, which the Department did do; the statute explicitly deprived the Department of any authority to hear such a case.

87. And reiterated in the Government brief here (see pp. 42-45).

88. In significant part these decisions had meanwhile been overruled by the Secretary on the authority of *Krushnic*.

how identical *Virginia-Colorado* and *Krushnic* were. To emphasize that identity to a Court in 1935 six of whose members had participated in the unanimous decision in *Krushnic* would have been to invite a summary disposition adverse to the Government.

C. The mining statutes and the Mineral Leasing Act cannot properly be construed to permit the Government to terminate a mining claim for default in assessment work.

The Government's present argument is substantially the same argument presented to this Court and rejected by it in the *Krushnic* decision. What little remained after *Krushnic* was decided adversely to the Government in *Virginia-Colorado.* As the facts show unequivocally, Secretary Ickes promptly acted to establish a Department policy consistent with the result announced by the Court and that policy was followed and consistently applied for twenty-five years thereafter, until *Union Oil.* The Government now moves to reargue the point of statutory construction thus settled for so long, although conceding that decisions of this Court construing statutes are not often subjected to re-examination.[89]

Even if there were a clean slate on which this Court could write, it still should rule that the relevant statutes gave the Government no basis to terminate a mining claim for default in performance of assessment work. This was well recognized as the general rule under the Mining Law; the supposedly contrary line of authority urged by the Government in *Krushnic* and again here as establishing an exception where the Government has or is asserted to have

89. Petition for Certiorari, pp. 16-17. The Government elsewhere recognizes that stability in the law is particularly desirable where ownership of real property interests is concerned (Brief, p. 42).

a specific competing use for the land in fact provides no applicable contrary basis for decision; and the text and the legislative history of the Mineral Leasing Act afford no ground for the Government's contention. On the contrary, the result reached in the prior decisions of the Court is compelled alike by the established law, and the policy considerations implicit in the governing statutes. There is thus joined to the normal reasons for desiring to adhere to prior decisions on a point of statutory construction the specific consideration that the prior decisions under the assault here were right.

(i) Under the mining law the Government had no general interest in the performance of assessment work.

As shown above,[90] the applicable law developed before there was any federal mining legislation, and the law with respect to assessment work served only to test priorities among rival private claimants to the same land. The United States had no interest in performance of the work, and Interior had no jurisdiction with respect to it. This continued to be so when in 1865 Congress first legislated and made federal courts available to enforce the miners' customary Law of Possession,[91] and when in 1866-1872 Congress enacted the federal mining statutes that continued in effect beyond the location of the oil shale claims in suit.[92]

90. Pp. 5-19, "The Legislative Setting of the Assessment Work Controversy."

91. 13 Stat. 440; *cf. Lownsdale* v. *Parrish*, 21 How. 290; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505.

92. The Mining Act of 1866, 14 Stat. 251; The Placer Act of 1870, 16 Stat. 217; The Mining Law of May 10, 1872, 17 Stat. 91, 30 U.S.C. 21 *et seq.*; see generally Swenson, at pp. 716-723.

While codifying the prevailing assessment work test of priorities among rival private claimants ($100 worth of work per year), the statutes also specified that a prior locator could preclude subsequent relocation by resuming the assessment work, thereby clearly signifying that a lapse in the work did not, so far as the United States was concerned, terminate a mining claim.[93] While thus leaving assessment work to serve only to test private priorities, the statutes specified a similar but distinct standard to test, in effect, priorities between the United States and a claim owner. To become eligible to receive transfer by patent of title from the United States, the claim owner would have to devote $500 worth of labor or improvements to development of his claim.[94] The statutes did by implication authorize Interior to determine whether patents should issue, *e.g.*, whether a discovery of valuable minerals had been made and whether the $500 requirement had been satisfied, but did not confer authority or jurisdiction on Interior to determine whether assessment work had been performed. Indeed, in detailing how a mining claimant could, by filing an application in a land office, obtain a patent, the statutes specifically provided that if a dispute arose under the miners' customary Law of Possession (and assessment work disputes could arise only under that Law), Interior was to stay its hand, refer the dispute to a court "of competent jurisdiction," and to be guided by the final judgment of the court in further processing of the patent application.[95]

93. Act of May 10, 1872, sec. 5, c. 152, 17 Stat. 92, as amended, 30 U.S.C. 28.

94. Act of May 10, 1872, 17 Stat. 92, as amended, 30 U.S.C. 28.

95. See, *e.g., Iron Silver Min. Co.* v. *Campbell,* 135 U. S. 286, 299; Act of May 10, 1872, 17 Stat. 92, 30 U.S.C. 29, 30. State courts had long been courts "of competent jurisdiction," see, *e.g., Erhardt* v. *Boaro,* 113 U. S. 527, 535, and Congress had acted in 1865 to make federal courts ones "of competent jurisdiction." 13 Stat. 440.

Although the Government's brief forbears to say so explicitly, there appears to be no serious controversy that as a general matter the performance of assessment work, whether before or after the enactment of the Mineral Leasing Act, has been a subject in which the Government has no interest.[96] That agreement between the parties reflects the decisions and regulations of the Department, both before and after the enactment of the Mineral Leasing Act of 1920, which recognize that the mining laws created no rights with respect to the performance of assessment work which the Secretary had a duty to protect or enforce. Such work was immaterial so far as the United States was concerned, and insofar as private claimants were concerned the question was expressly committed to the exclusive jurisdiction of the courts. See, *e.g.*, *P. Wolenberg*, 29 L. D. 302 (1899); *Nielson* v. *Champagne Mining and Milling Co.*, 29 L. D. 491, 493 (1900). Interior's regulations have always explicitly conceded as much. *Regulations*, 37 L. D. 757, 769 (1909); *Regulations*, 49 L. D. 58, 73 (1922). The current version of the regulations, 43 C.F.R. §3420.4 (1969), provides that annual assessment work "is . . . solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."

A sampling of statements by Interior just prior to the enactment of the Mineral Leasing Act shows its recognition, in the specific context of oil shale, that the question

96. At page 32 of its brief the Government says that "the proposition that . . . the Department has not . . . claimed jurisdiction to enforce the assessment work requirement of the Mining Act . . . has [never] been entirely true." The negative construction is pregnant with the concession that broadly speaking the proposition is very true, indeed.

of assessment work was no concern of the Department. Thus, Secretary Lane himself advised Mr. J. B. Jenson of Salt Lake City in a letter of October 23, 1918:

> I am in receipt of your letter dated October 2, 1918, and making inquiry as to the necessity for performing annual assessment work on some oil shale lands in Wyoming, which you and associates are claiming under placer mining locations made in 1917 and 1918.
>
> • • • • •
>
> As a general rule matters involving questions of assessment work on mining claims arise between adverse claimants to the same mineral land and go only to the right of possession, the determination of which is committed exclusively to the courts (Pl. Ex. 51; A. 99-100).

The Assistant Commissioner of the General Land Office, in a letter of January 20, 1919, to Chris C. Dere of Grand Valley, Colorado (then the center of oil shale activity), wrote to the same effect: that annual assessment work was "solely a matter between rival or adverse claimants . . . and goes only to that right of possession, the determination of which is committed exclusively to the court" (Pl. Ex. 52; A. 100). First Assistant Secretary Vogelsang made the same point in a letter of October 24, 1919:

> With respect to the performance of annual assessment work on mining claims, I have to advise you that it has always been held that this is a matter between rival or adverse claimants to the same tract of land, and within the jurisdiction of the courts and not of this Department (Pl. Ex. 289; A. 271).

Interior continued throughout the assessment work controversy itself to recognize that insofar as the mining

statutes were concerned, default in assessment work did not terminate a claim and Interior lacked authority to consider assessment work questions. Indeed, the Secretary's ruling in *Krushnic* itself, 52 L.D. 295, 301 (1928), while expressing the view that the law was otherwise with respect to Leasing Act minerals, acknowledged that "There is no doubt that the doctrine above quoted [that a locator's rights after resumption of assessment work were precisely what they would have been if no default had occurred] continues to be the law as to mineral lands subject to location and purchase under the general mining law . . ." Later the same year First Assistant Secretary Finney ruled, citing the Secretary in *Krushnic,* that

> The long-established rule that the department has nothing to do with the question of the performance of annual assessment work on mining locations made upon lands that continue to be subject to location, entry, and purchase under the mining laws . . . still remains in full force and effect. (*Gorda Gold Mining Co.* v. *Bauman, On Petition,* 52 L.D. 519, 521-522 (1928)).

Similar acknowledgments appear in *Proceedings Against Mining Claims Within the Area of the Boulder Dam Project, Instructions,* 53 I.D. 228 (1930), and *Challenges to Validity of Mining Claims in National Parks,* 53 I.D. 491 (1931).

Statements to the same effect, although unqualified as to Leasing Act minerals, appear immediately following this Court's ruling in *Virginia-Colorado,* and continue until *Union Oil.* For example, Commissioner Johnson of the General Land Office wrote on July 25, 1935, that "this office has no jurisdiction over questions relating to the performance of annual assessment work on mining claims,

such questions being committed exclusively to the courts" (Pl. Ex. 55; A. 102) and to the same effect on July 20, 1935, July 26, 1935 and July 29, 1935 (Pl. Exs. 57, 56, 58; A. 103-104). See also Under Secretary Chapman's letter to Senator Ecton in 1946 (Pl. Ex. 59; A. 104-105); "whether the work done is of a nature that would be considered assessment work is not one within the jurisdiction of this Department but is for the appropriate court to determine. . . ." More recently, the Under Secretary wrote on June 13, 1958, to Representative Engle, Chairman of the House Committee on Interior and Insular Affairs, expressing Interior's views on pending legislation which among other matters would have suspended assessment work for a year. He there said: "The performance of assessment work is not of direct concern to this Department, since the failure of a locator to perform the required labor or make the required improvements annually does not of itself forfeit his claim, but merely renders it subject to loss by relocation." 1958 U. S. Code Cong. & Adm. News 3819.

(ii) Contrary to the Government's contention in *Krushnic*, which is renewed here, there was and is no well established exception giving the Government an interest in the performance of assessment work where there is a subsequent withdrawal of the land.

While at least *sub silentio* conceding that generally speaking the Department has no interest in the performance of assessment work, the Government asserts that beginning in the 19th century there developed a "rule . . . that the possessory right within an area subsequently withdrawn is valid against the Government only so long as it is maintained, including the performance of annual

assessment work" (Brief, p. 52). The critical point of the argument, that "maintenance" of the claim was held to include the performance of annual assessment work, is not, however, established by the cases cited, and there is scant support, indeed, for the assertion (p. 56) that "unpatented and unperfected claims had always been subject to defeasance by the United States for want of assessment work when the land was withdrawn without possibility of relocation." The Government rightly notes (*ibid.*) that "the 1920 Mineral Leasing Act did not, in fact, change existing law," but the existing law thus left unchanged had a character quite different from the Government's analysis.

The opinion to the Secretary of War of Attorney General McVeagh in *Fort Maginnis*, 1 L.D. 552 (1881), is taken as the fountainhead of the supposed "rule". The difficulty with that characterization is that, while the Secretary posed three questions for the Attorney General's opinion, none of them concerned assessment work, and the opinion itself does not refer to assessment work. The Secretary desired an opinion (1) as to whether mineral lands could be reserved for military purposes, (2) whether having been reserved the lands remained open to mining location, and (3) whether mining claims located prior to the reservation might thereafter be taken to patent. The Attorney General answered the first question yes and the second no. As to the third, he said that "so long as [the locator] complies with the conditions imposed by [the mining laws]" those laws confer possessory rights which, he notes, as "recognized by Congress are property of great value" (at 554). He thus concluded that

> where such rights have attached to mineral land in favor of the locator of a mining claim the land

> during the continuance of the claim (i.e., so long as it is maintained in accordance with law) . . . cannot, while that right exists, notwithstanding the title thereto remains in the government, be set apart by the Executive for other uses. (*Id.*)

The parenthetical reference to the maintenance of the claim is presumably the basis for the Government's argument here, but there is no mention of assessment work as comprehended within the term, and it could more reasonably be given significance as meaning so long as not worked out or abandoned. *Cf. Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 336. There is no reference whatsoever to assessment work by those words, and the suggestion in the Government brief (p. 52) that the words which the Attorney General did use in referring to "maintenance" meant assessment work is of course to assume the very conclusion for which the opinion is cited as authority.[97]

No such rule as the Government contends having in fact been stated in *Fort Maginnis*, it is clear that "subsequent rulings" could not, as claimed, have "extended that rule" to other subjects (Brief, p. 52). Moreover, an examination of the succeeding authorities cited by the Government will show that neither can they be taken as *sources* of the supposed rule. In *Yosemite National Park*, 25 L.D. 48 (1897), chronologically the next case cited, the questions presented for opinion by the Assistant Attorney General were as in *Fort Maginnis*, three: (1) the authority of the superintendent of Yosemite National Park to regu-

97. It should be noted, further, that the headnote to the opinion is equally barren of any reference to assessment work. It says in regard to the Attorney General's third point only that, "But where mining claims were legally located and held prior to such reservation, the miners' rights cannot be divested by taking the land for military purposes." 1 L. D. at 552.

late the working of valid claims within the Park perimeter, (2) as to when claims were to be regarded as lapsed or abandoned, and (3) as to the regulation of the miners' rights outside the limits of their claims, as in the construction of trails and cutting timber. After a general discussion of the rights arising from a mining location, the opinion answered the express questions put by saying that the superintendent had no authority to regulate the working of claims, and, on the second point, that the superintendent equally "has no authority to determine when such claims 'are to be considered as lapsed or abandoned'" (25 L.D. at 51). On that subject the Assistant Attorney General suggested that the superintendent be instructed that "in case any claim which was duly located and subsisting at the date of said act shall be made to appear to him as having been abandoned he report the facts in the case to the Secretary for his consideration and action" (at 52). The only reference to assessment work anywhere in the opinion is in the second of the three questions put, which the Attorney General takes from the inquiry propounded by the Superintendent:

> 2. In regard to determining when claims are to be considered as lapsed or abandoned, as by reason of failure to perform necessary assessment work, or to record the same.

It is noteworthy that the Attorney General did not himself adopt in his response the phrasing in the question. On the contrary, in suggesting that abandonment was the operative concept, the *Yosemite* opinion offered a construction in harmony with the reading given above to the concept of "maintenance" in *Fort Maginnis*.

The third authority, the Assistant Attorney General's opinion in *Navajo Indian Reservation*, 30 L.D. 515 (1901),

is equally far from constituting support for the Government's view here. Claims had been located within the area subsequently set apart as a Navajo reservation, but the facts showed that annual assessment work had not been performed on most of them. Upon a revival of interest in the minerals, work was resumed and conflicts arose between claimants under the original locations and claimants under purported relocations made after the establishment of the reservation. The Commissioner of Indian Affairs, concerned at incursions upon the reservation by the mineral claimants, recommended that only those claimants who could show a right based upon locations made prior to the reservation be allowed to go upon it, 30 L.D. at 517. The Attorney General concluded that the recommended course would commit the Department to the determination of competing rights to possession which "it has no jurisdiction to do . . . The determination of that right is committed by the mining laws to the courts alone" (at 520).

As in *Yosemite*, the opinion rests in no part on any consideration of assessment work. Indeed, in *Navajo* what is said about assessment work is quite contrary to the Government's contention here. The opinion quoted from a passage in a report of the Commissioner of the General Land Office which talked of "maintenance" of a claim, noting that perhaps the Indian Office might have reported the failure in assessment work "with a view to determining whether the claims were actually abandoned and forfeited" (at 516).[98] The Attorney General's opinion (see 30 L.D. at 518) refers to the possible conse-

98. With the recognition that after default in assessment work, abandonment remained something to be proved, should be compared the Government's suggestion that the two ought to be regarded as essentially synonymous (see Brief, pp. 44-45).

quence of "an abandonment or relinquishment of such claim" subsequent to the order creating the reservation; it does not talk of a default in assessment work. As is true of *Yosemite,* the *Navajo* opinion is not authority for the proposition that a failure to continue assessment work entitles the Government to forfeit the claim.

In their bearing upon the Government's contention that this Court's decision in *Virginia-Colorado* was the product of oversight—that, indeed, "it is entirely possible that the Court would have ruled the other way in *Virginia-Colorado* had it been apprised of this background" (Brief, p. 56)—*Yosemite* and *Navajo* share one other distinction. Both opinions were written by then Assistant Attorney General Van Devanter who, as a member of this Court, participated in the unanimous decisions in *Krushnic* and *Virginia-Colorado.*[99] With all deference, the suggestion that *Virginia-Colorado* resulted from some massive inadvertence is simply untenable. Equally so, in the circumstances, is the suggestion that these cases discussed above constituted a well-developed line of authority contrary to the conclusions reached in *Krushnic* and *Virginia-Colorado.*[100]

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99. Moreover, as the author of *Cameron* v. *United States,* 252 U. S. 450, he obviously did not share the view pressed by the Government here, that *Krushnic* and *Virginia-Colorado* conflict with *Cameron* on the scope of Interior's jurisdiction. He, as this Court recently noted, "as Assistant Attorney General for the Interior Department from 1897 to 1903, did more than any other person to give character and distinction to the administration of the public lands. . . ." *Best* v. *Humboldt Placer Mining Co.,* 371 U. S. 334, 336-337.

100. *Arid Land,* 32 L.D. 387 (1904), another case cited, was an instruction from Secretary Hitchcock concerned with the question of what lands were excepted from a withdrawal for reservoir sites or permanent water works at the time they were made, and not with a default subsequent to withdrawal; language that might appear to apply to the consequences of post-withdrawal failure to perform assessment work was thus not necessary to the decision. *E. C. Kinney,* 44 L.D. 580 (1916), a ruling by Assistant Secretary Jones on a claim

The remaining Department cases in this supposed "line of authority" are four decisions all rendered by Assistant Secretary Finney, the author of the first Department decision in *Krushnic*, see 52 L. D. at 283, who was himself on the Government brief in this Court. They reflect the same point of view expressed in *Krushnic*, and far from constituting independent authority for the Department's view there, or the Government's contention here, represent simply multiple utterances of the same view by the same spokesman.[101] The last authority, and the only judicial utterance cited as in point, is the decision in *Hodgson* v. *Midwest Oil Company*, 17 F. 2d 71 (8th Cir. 1927), a case heavily relied on by the Government in *Krushnic* and both distinguished and specifically rejected by the Court of Appeals. See *United States ex rel. Krushnic* v. *West*, 30 F. 2d 742, 745-46 (D. C. Cir. 1929).[102]

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for damages against the Reclamation Service for flooding a mine, says that the claimant "failed to comply with the requirements of the general mining laws . . . particularly with reference to the performance of the assessment work". It is not clear that the assessment work point was decisive of the result, and that part of the opinion appears to depend upon the mis-reading of *Navajo* as stating the conclusion that "default" in assessment work would terminate the claim, whereas Assistant Attorney General Van Devanter had talked of "abandonment or relinquishment".

101. The decisions, in chronological order, are those in *Interstate Oil Corp. et al*, 50 L.D. 262 (1924); *Cronberg* v. *Haslett*, 51 L.D. 101 (1925); *United States* v. *Ruddock, et al.*, 52 L.D. 313 (1927); and *Standard Shales Prod. Co.*, 52 L.D. 522 (1928). The last of the four depends upon *Interstate* and the Departmental decision in *Krushnic*, see 52 L.D. at 524; *Ruddock* in turn also rests heavily on *Interstate*, see 52 L.D. at 324.

102. The Government argument in *Krushnic* in this Court heavily relied on *Hodgson* (Brief, pp. 20, 37). After this Court's decision in *Krushnic* Interior realized that *Hodgson* and the four Finney decisions discussed above were no longer viable. Three of the four were promptly overruled; the fourth is at best a derelict. See *Standard Shales Prod. Co., On Rehearing*, 53 I.D. 42 (1930); *Proceedings Against Mining Claims Within the Area of the Boulder Dam Project, Instructions*, July 7, 1930, 53 I.D. 228, 230 ("The reasons expressed in *E. C. Kinney* . . . and for the holding in the *Chittenden* case . . . are clearly incompatible with the Supreme Court's opinion" in *Krushnic*).

(iii) The text, the context and the legislative history of the Mineral Leasing Act clearly refute the contention that the performance of assessment work was thereafter required upon pain of forfeiture of the claim to the United States.

Although the Government's brief devotes attention to some of the circumstances surrounding the consideration of a mineral leasing bill during the second decade of this century and to analysis of the supposed policies implicit in it, which are said to require a result contrary to that previously reached by two unanimous decisions of this Court, the Government is nowhere able to find express language either in the enactment itself or in the legislative history to aid its purpose. In this respect, the Government here has been no less diligent, and no more successful, than in the very similar presentations to this Court in the *Krushnic* and *Virginia-Colorado* cases.[103]

Section 1 of the Mineral Leasing Act of 1920, 41 Stat. 437-439, as amended, 30 U.S.C. 181, withdrew coal, phosphate, sodium, oil, oil shale and gas, from subsequent claiming under the mining laws. One might expect that any argument that this Act was intended, in addition, to withdraw prior located mining claims if and when assessment work were not performed thereon, would be based upon some asserted construction of this section. That, however, has not been the case, and there is no basis for such an argument. Curiously, the argument for that greater withdrawal has instead seized upon the "savings" or excepting clause at the end of the Act, Section 37, 41 Stat. 451, as amended, 30 U.S.C. 193. To read a savings

103. Thus, the discussion of the legislative material both in the Government's brief in *Krushnic* (Brief for the Petitioner, pp. 34-35) and here (Brief, pp. 59-62) focuses on the protection intended to be extended by the savings clause to those seeking minerals who had not yet made a discovery.

involved in the earlier decision in *Joshua L. Smith*, supra; *Winifred S. Schmitz*, 38 L.D. 587 (1910); *Lizzie Trask*, 39 L.D. 279 (1910).

Indeed, a decision in this later line of authority was rendered by the Department on the very eve of enactment of the Mineral Leasing Act. *James Morris*, 47 L.D. 326, decided January 20, 1920. In that case Morris had settled in 1909 on land included within a public water reserve created in 1917 under the Pickett Act. The plat of survey was filed in the land office on January 10, 1918, and under the statute Morris had three months to make application. This he failed to do, and the Commissioner held the entry for rejection. Assistant Secretary Vogelsang reversed, although the relevant savings clause in the Pickett Act stated that its terms "shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made", 36 Stat. 847, as amended, 43 U.S.C. 142. Said the Secretary, the withdrawal "is not such an 'adverse claim'" within the meaning of the decisions of the courts and the Department as would defeat the application.

There is thus no support for the Government's view in the Mineral Leasing Act itself or in parallel or analogous legislation. The legislative history materials on the Mineral Leasing Act itself to which the Government refers provide no better support for that view. As the Government notes, "the oil shale problem was a very small part of the context out of which the Mineral Leasing Act of 1920 arose" (Brief, pp. 58-59). The Government's argument seems to be (1) that Congress believed that no oil shale claims would be patented under the mining laws because substantial expenditures would be required to bring

about commercial production, (2) that Congress intended to terminate valid oil shale claims if the assessment work were not continuously performed, and (3) that Congress offered a "lease alternative" in order to relieve the claim owners of the financial burdens of performing assessment work. For none of these propositions does the Government cite any specific expression of intent, even by an individual Congressman, let alone any authoritative expression of intent such as a Committee Report or statement by one of the leading advocates of the legislation. None of these propositions has any logic, and all are refuted by the legislative history.

Under the mining laws, whatever obligation there was to do assessment work started with the discovery of valuable mineral deposits and ceased with the patenting of the claim.[111] Legal title then stood in the claim owner, and the claim could not be relocated, the United States had no further interest whatsoever in the land, and whether the claim owner produced minerals promptly, or spent forty years developing and improving processing technology, was solely for him to decide. To obtain patent and thereby terminate all assessment work obligations forever, the claim owner was required to invest only $500 worth of labor and improvements in developing his claim. The notion that it would be to the claim owner's financial advantage, instead of thereby obtaining fee simple title, to take a lease, even a long-term lease, with rental and royalty obligations which could be waived for five years at most and which might not be waived at all, and with the royalties subject to readjustment every twenty years *by the lessor*, has neither any practical basis nor support in the

111. See, *e.g.*, *Union Oil Co.* v. *Smith*, 249 U. S. 337, 348, 350, 353; Act of May 10, 1872, 17 Stat. 92, as amended, 30 U.S.C. 28.

legislative history. Yet that notion is vital to the Government's argument.

Even if the purpose of the lease alternative were to make leasing more attractive financially than patenting, it does not follow that, as the Government argues, Congress intended to require mining claimants to do work each and every year until or unless patent was applied for and obtained. Congress could very likely have thought that the lease alternative relieved the claimant of investing the $500 worth of work required as a condition to obtaining patent under the mining laws. Of course that patent work did not have to be done in successive years in $100 increments, and it was equally well established that a failure to perform patent work did not create any right of forfeiture in the United States.

Although it is true as the Government notes that Congress was primarily concerned with oil claims and preservation of rights therein, the Government is wide of the mark in asserting (Brief, pp. 26-27) that the legislative history as to preservation of rights in oil shale claims consists principally of the remark that claims could be exchanged for leases. What actually happened begins in 1916, when the Secretary of the Interior wrote to Senator Myers, then Chairman of the Senate Committee on Public Lands, suggesting that oil shale be included in the leasing bill. E. C. Finney, then a member of the Department's Board of Appeals, and George Otis Smith, Director of the Geological Survey, testified in that year in the Senate hearings on the subject, emphasizing the prospective value of the oil shale deposits of the Green River Formation.[112]

112. Hearings before the Senate Committee on Public Lands on H.R. 406, "Leasing of Oil Lands," 64th Cong., 1st Sess. (1916), pp. 301, 320.

Testimony was also presented at the 1917 Senate hearings by a representative of the Bureau of Mines.[113]

In 1918 comprehensive hearings on oil shale were held by the House Committee on Public Lands.[114] A variety of witnesses, such as Professor R. D. George, State Geologist of Colorado, testified about the extent and potential of the oil shale deposits of the Green River Formation, reviewing the dwindling reserves of oil, the increasing demand for oil, the successful mining of shale oil and retorting of shale oil and by-products in Scotland, private and governmental activity looking to development of a domestic shale oil industry, and the resulting value and importance of the oil shale deposits of the Green River Formation.

A number of oil shale claimants presented their views to the Committee; they uniformly opposed inclusion of shale oil in the leasing bill, even if the leasing terms were to be very liberal, and urged that oil shale remain open to location and patent under the mining laws.[115] They surely did not regard leasing as financially preferable to patenting or think the patent requirements onerous: "To allow shale-bearing lands to go to patent would be an inducement to capital."[116]

The Committee also received substantial evidence that Interior regarded oil shale claims located in good faith as eligible for patent.[117] The Chairman noted however that as

113. Hearings before the Senate Committee on Public Lands on S. 45, "Leasing of Oil Lands," 65th Cong., 1st Sess. (1917), pp. 250 *et seq.*

114. Hearings before the House Committee on Public Lands on H.R. 3232 and S. 2812, "Oil Leasing Lands," 65th Cong., 2d Sess. (1918), pp. 811-1241.

115. See *id.* at pp. 818, 828, 831-832, 883-887, 906-907, 909-914, 1120-1123.

116. *Id.* at 887.

117. *Id.* at 818, 828, 897, 904, 905.

long as claims remained unpatented there would be uncertainty as to title, that this uncertainty might impede financing of large oil shale production complexes, and that the quick security of title that a lease would afford might therefore be desirable. The Chairman's views were discussed at some length; the "lease alternative" to existing claims was advanced solely as providing secure title, and no mention was made of any supposed savings in patent development work, which the oil shale claimants were, as noted, eager to do.[118] It seems clear then that the provision of a leasing alternative was intended as a convenience for those claimants, if any, who might want to avoid the delays, which then[119] as now could be over a decade, in obtaining patent.

The Government's argument that the provision of a leasing alternative logically signifies an understanding that otherwise many years of assessment work expenses would be incurred before commercial production came about, cannot conceivably be applied to oil, of which "flush" production generally followed promptly upon discovery. Yet the Congress provided for a "lease alternative" to perfected oil claims,[120] and did so before it did so for oil shale. As agreed here, Congress concentrated on oil claims; it was quite natural to pattern the oil shale provisions of the leasing bill after the oil provisions.

118. *Id.* at 909-914.

119. See, *e.g.*, *id.* at 913-914.

120. Act of Feb. 25, 1920, Secs. 18, 19, 41 Stat. 443-445, as amended, 30 U.S.C. 227, 228. The obvious reason for such an alternative was to afford security of title, thereby avoiding long delays and uncertainties about patenting. See, *e.g.*, Roberts, *Salt Creek* (W. H. Kistler Stationery Co., Denver, Colo., 1956), Ch. IX, pp. 135-158, *"Government Leases Replace the Placer Claims, 1919-1921"*. As Roberts notes, *id.* at 159, "The issuance of the government leases opened the way for an intensive drilling campaign throughout the big productive area of the Second Wall Creek Sand."

It seems clear then that Congress did not intend to alter the mining laws so as to forfeit oil shale claims if the assessment work were not thereafter continuously performed. Indeed, the legislative history is clearly and precisely to the contrary. In the debate in the House immediately preceding adoption of the conference report Representative Taylor of Colorado, one of the managers of the bill on behalf of the House (see 59 Cong. Rec. 2709, 66th Cong., 2d Sess., February 10, 1920), made clear beyond speculation of the kind in which the Government indulges, that the Mineral Leasing Act was not to be given a construction which would bring consequences upon then validly existing claims which would not have befallen them had the bill not been enacted. Mr. Taylor, after referring to the fact that the bill represented the adoption of a leasing policy, observed:

> Yet the Senate and the House have both always retained in every bill of this kind the provisions of section 37 and expressly recognized and legalized and attempted to affirmatively protect the property and legal rights under the laws as they are now and have for over 40 years been on our statute books of the honest prospectors, the bona fide locators in good faith, and holders of rightful claims, claims that are valid and existing under existing laws at the date of the passage of this act. Those claimants, even though they may not have perfected a legal discovery under the laws, are entitled to go ahead and maintain and perfect their claims under the present existing laws and obtain a patent to their lands *just as though this bill had never been passed.* I hope no court or Federal department will ever attempt to deny to these people the rights which Congress looks upon as vested and is attempting in section 37 to guarantee to them. (59 Cong. Rec. at 2711-12) (emphasis supplied).

The intention of Congress can of course receive no proper implementation if, after passage of the Mineral Leasing Act, a default in performance of assessment work is held to have consequences—the assertion of an adverse claim by the Government—which, had the bill never been enacted, could not plausibly be claimed to arise.

POINT II

The District Court and the Court of Appeals rightly held that the department lacked subject matter jurisdiction to render the 1928-1931 assessment work decisions against the claims in suit.

It is necessarily common ground that the absence in the Department of statutory authority—subject matter jurisdiction—to conduct the assessment work proceedings would render the resulting decisions, including those in 1928-1931 involved here, subject to attack, whether direct or collateral. In the words of the District Court's opinion they were "wholly nugatory, need not be appealed, and cannot be res judicata" (A. 46). As the Government notes (Brief, p. 28), the principal ground of decision below was the Department's lack of jurisdiction.

The Government argues here that the courts below erred, and advances that contention in two aspects. It says first, that this Court's prior decision in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, which was a principal reliance of the courts below, did not constitute a ruling on the Secretary's jurisdiction, but was instead only a holding that the Secretary had committed "error in construing the maintenance provision" of Section 37 (Brief, p. 4). The Government then seeks to jus-

tify that reading of *Virginia-Colorado* by the further argument that as a general proposition the Secretary has broad powers, relying here as in the Court of Appeals principally upon the *Cameron*[121] and *Best*[122] cases; that in particular the Department has the power to examine into the validity of claims when it has a competing use to which it wishes to put the land; and that still more specifically the Secretary must necessarily have had the power to construe and apply the Mineral Leasing Act, including Section 37. Inasmuch as the focus of the Government's argument is the prior decision of this Court in *Virginia-Colorado,* we first consider whether that decision, in the language used and the setting in which it was rendered, can plausibly be given a meaning other than as a ruling on the Department's jurisdiction. We then turn to show that giving the *Virginia-Colorado* decision its plain meaning as a ruling on the Secretary's jurisdiction involves no wrench of doctrine. On the contrary, the decision so read constitutes simply a particular application of the general rule that the Secretary has authority (jurisdiction) to act upon any matter where the statute creates a right which it is his duty to protect. Having, as has been shown, no duty with respect to the performance of assessment work, he has no jurisdiction to challenge its nonperformance.

A. The *Virginia-Colorado* decision was a ruling on the Department's subject matter jurisdiction.

The opinion of Chief Justice Hughes for a unanimous court in *Virginia-Colorado* is not long, its reasoning is not complex, and its language is characteristically straight-

121. *Cameron* v. *United States,* 252 U. S. 450.

122. *Best* v. *Humboldt Placer Mining Co.,* 371 U. S. 334.

forward. The operative passage occupies hardly three pages, and the Chief Justice made only the two points necessary to the decision. The first was that numerous decisions of the Court, most recently that in *Krushnic*, had made the "character and extent of the right" which arises from a mining location "well established". 295 U.S. at 644. While the mining law required the performance of assessment work, it was clear (paraphrasing and quoting from the *Krushnic* opinion) that prior to the Mineral Leasing Act assessment work was not required to maintain a claim against the United States. The first point concluded with a succinct summary of the grounds upon which the Department did have "authority" to challenge a mining claim:

> There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. *Cameron* v. *United States*, 252 U. S. 450, 460; *Cole* v. *Ralph*, 252 U. S. 286, 296; *Black* v. *Elkhorn Mining Co.*, 163 U. S. 445, 450; *Brown* v. *Gurney*, 201 U. S. 184, 192, 193; *Farrell* v. *Lockhart*, 210 U. S. 142, 147. (295 U. S. at 645)

The second point in the opinion is devoted to a consideration of the Mineral Leasing Act. It concludes that the "maintenance" provision of Section 37 is "manifestly" satisfied by a resumption of work,[123] noting that the plain-

123. The opinion nowhere suggests that having made preparations to resume, or having an intention immediately to do so, is material. The Government, following what it confesses is "somewhat tortuous" reasoning (Brief, p. 47), would have it that these facts, alleged in the bill in *Virginia-Colorado* and, by virtue of the demurrer, admitted, are decisive of the result in the case. Neither the opinion nor its rationale suggests as much. On the contrary, these facts would not

tiff's rights would then be just as if no default had occurred. The Chief Justice noted that "The Government invokes the new policy of the Leasing Act abolishing the practice of location", but observed that "the saving provision of §37 is a part of the policy of the Act" declared by Congress "with full understanding of the status of such claims under the prior law". *Id.* at 646. The second part of the opinion, in a construction obviously intended to parallel the first point, concluded with a succinct summary of what the Department did *not* have "authority" to do:

> We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. At 647.

The Government here, correctly we think, urges that the Secretary's powers in the areas to which Chief Justice Hughes pointed as within his "authority" are to be analyzed in terms of his subject matter jurisdiction (Brief, pp. 29-30). *Cameron* v. *United States,* 252 U. S. 450, is indeed both cited in the opinion in the passage quoted and quoted at length in the Government's brief (pp. 30-31).[124]

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have sufficed to defeat a private relocation, for while there has been some dispute as to whether the prior location may be maintained by the resumption of work after a relocation has been commenced but before it has been completed, it is clear that a mere intention or readiness to resume would not serve to protect the claim. See *Bunker Chance Mining Co.* v. *Bex,* 408 P. 2d 170 (Idaho 1965); 2 American Law of Mining §§7.30-7.33. Furthermore, the endless uncertainty which would be injected if the questions of "how ready", "how soon", and "how clear an intention" became material, and the evidentiary problems as to what would constitute sufficient proof of those elements, are heavy additional grounds for rejecting this suggestion.

124. The Government's other principal authority, *Best* v. *Humboldt Placer Mining Co.,* 371 U. S. 334, was of course not cited in *Virginia-Colorado.* But as the Government says (p. 31) it "reaffirmed" what had already been said in *Cameron.*

oil shale contests was suspended after April 1, 1933, "awaiting court decision on jurisdiction of the Department to challenge the validity of oil-shale locations for failure to perform annual labor thereon" (Pl. Ex. 44; A. 93).[130] Other references to the "jurisdiction" or "right" or "authority" of the Department to proceed on the assessment work ground appear in the evidence.[131] It cannot be reasonably questioned that the whole focus of the post-*Krushnic* controvery leading up to the *Virginia-Colorado* decision in this Court was the Department's jurisdiction.

In this Court itself, the case had that same emphasis. The Government brief in that case stated the question presented as "Does Section 37 of the Leasing Act of February 25, 1920, give to the Secretary of the Interior *power,* upon hearing, to cancel claims to oil shale lands" etc. (emphasis supplied).[132] Not only was the question presented stated in jurisdictional terms but the Government's argument itself was developed in similar terms. The Government argued that, although the Mineral Leasing Act did not expressly give the Secretary the authority to recover possession of mining claims in default of assessment work, "if the right of repossession exists in the Government," as the Government contended, "the broad authority vested in the Secretary of the Interior is suffi-

130. In similar fashion then Assistant Secretary Oscar Chapman postponed argument in a pending appeal in the Department where "the principal question presented relates to the jurisdiction of the Department to enter inquiry as to the performance of annual assessment work on oil shale placer locations . . . inasmuch as this question is now involved in the [*Virginia-Colorado*] case . . ." (Pl. Ex. 53; A. 101).

131. *E.g.*, Pl. Ex. 48; A. 97 (a 1930 letter from Assistant Secretary Edwards to counsel as to an appeal where "the principal question raised . . . [is] the jurisdiction of the Department"); Pl. Ex. 49; A. 97-98.

132. Brief for the Petitioner, p. 2.

cient to empower him to enforce that right" (Brief for the Petitioner, p. 16). The *Virginia-Colorado* case was thus squarely presented as a test of power: the very theory of the Government's case was that the Secretary's subject matter jurisdiction must be co-extensive with his statutory duty to inquire.[133] The case was presented to this Court so as to invite, if not indeed to require, a ruling on the Department's jurisdiction. The answer given in the opinion was thus precisely responsive to the question put.

Finally, as the voluminous evidence shows, the decision once rendered was acted upon by both the Executive and Legislative branches as a construction of the Secretary's jurisdiction.

B. The Department's power to inquire extends wherever it has a duty to act; having no duty to act with respect to the performance of assessment work, it had no power to inquire into it.

The prior decisions of the Court, in particular that in *Virginia-Colorado*, were not only plain rulings on the Secretary's jurisdiction. They stand, as such, in harmony with the principles reflected in numerous decisions of this Court which have had occasion to pass on specific aspects of the Secretary's power.

Here, as in the Court of Appeals, the Government offers in opposition a broadly stated argument as to the authority of the Secretary, supported only by the language of cases not one of which concerns assessment work and most of which have nothing at all to do with mining claims or the Mining Law. This breadth of focus blurs

133. This rationale was previously advanced by the Department in *Federal Shale Oil Co.*, 53 I. D. 213, 220 (1930): "The leasing act of necessity conferred jurisdiction to inquire into and determine this question [of assessment work]".

analysis. Such jurisdiction as the Secretary has to rule upon the validity of mining claims in contest proceedings is nowhere expressly conferred by statute, [134] it has instead been implied by necessity from the statutes concerned with public land to the extent required to give effect to them. Unlike the regulatory statutes which confer sweeping authority to grant or withhold licenses, franchises and the like upon considerations broadly stated in terms of "public convenience and necessity", the mining laws themselves, as we have shown, define the conditions under which valid claims are created and the Secretary plays no part in that creation. Indeed, as this Court stated in *Payne* v. *Central Pacific Ry.*, 255 U. S. 228, 236, the Secretary's broad power of control and supervision

> . . . of course . . . does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act.

Interior's jurisdiction to challenge mining claims is, in short, confined to inquiry whether the statutory conditions established by Congress as the basis of the grant have been met.

The soundness of that analysis is shown by the decision of this Court in *West* v. *Standard Oil Co.*, 278 U. S. 200. The conclusiveness of the Secretary's determination there was held by Mr. Justice Brandeis to depend upon the jurisdiction conferred, which in the critical passages in the

134. As this Court said in *United States* v. *Cameron*, 252 U. S. 450, 461, a precedent much cited in the Government's brief: "True, the mineral land law does not in itself confer such authority on the land department." Note the use here of "authority" in a jurisdictional sense. *Cameron* was heavily relied upon by the Government in *Virginia-Colorado*, and the opinion in the latter case was thus evidently addressed to the terms in which the *Cameron* opinion had been stated.

opinion is referred to as the Secretary's "authority" (*id.* at 220, 221). What the Court said was that when Congress imposes a duty upon the Secretary, such as to issue patent upon application of the claimant (*id.* at 218), it "by implication confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed" (*id.* at 219). When, however, the Secretary makes a determination which no duty requires him to make he acts "without authority" and his acts are therefore ineffective (*id.* at 221). Stated conversely, only where Congress has created a right which the Secretary has a duty to protect has the Secretary authority to act.

The authorities cited by the Government in support of the argument that the Secretary's jurisdiction is "all-inclusive" (Brief, p. 29) in fact support precisely the analysis urged here. *United States* v. *Cameron*, 252 U. S. 450, and *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, upon which the Government principally relies (Brief, pp. 29-32), were both concerned with the issue of "discovery", which is of course the very basis for the existence of a mining claim. Neither of those cases presented any occasion for rulings of the breadth contended for by the Government, and neither establishes the Secretary's jurisdiction as to assessment work. That *Virginia-Colorado* is not at war with the doctrine given recognition in *Cameron* is clear enough in principle, but it may also be observed that Mr. Justice Van Devanter, the author of the opinion for a unanimous Court in *Cameron*, was a member of the likewise unanimous Court in *Virginia-Colorado* (and *Krushnic*).

The other four authorities cited offer no better support for the Government's argument here. *United States*

v. *Schurz*, 102 U. S. 378, held that a homestead claimant was entitled to mandamus directing the Secretary to issue patent, against the Government's contention that the patent had been erroneously executed inasmuch as the land in fact lay within the limits of an incorporated town and was ineligible for entry. The Court said that the question whether the land was subject to location was "a question for the land-officers to consider and decide before they determined to issue . . . a patent" (at 401). The matter was therefore within their jurisdiction and, if erroneous, merely voidable, and not, as the Government contended, void. *Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, and *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, both concerned the power of the Secretary to make factual determinations necessary to give effect to statutory land grants. In *Nesqually* the question was the extent of the land which had actually been occupied as a missionary station; in *Rust* it was the classification of land as swamp land or not. Both decisions reflect the rationale that the Secretary's powers are co-extensive with the duties imposed upon him by the statute. In *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, the last authority cited by the Government, the issue raised was the homestead applicant's complaint that the Secretary had acted arbitrarily in dismissing his application for failure to supply adequate proof of the non-mineral character of the ground. The Court held mandamus inapplicable where the statute "gave him the power and imposed upon him the duty to decide for himself" (at 325).[135]

135. With this should be contrasted the Government's contention here that the grant of mandamus relief in *Krushnic* does not "carry with it the implication that the Court felt the Secretary had overstepped his jurisdiction . . ." (p. 35, n. 15).

Correctly viewed, the question of the Secretary's power to inquire as to assessment work depends upon his duty to act with respect to it. As has already been shown, it is clear in fact—and not controverted by the Government—that neither before nor after enactment of the Mineral Leasing Act has any statute conferred on the Department, or the Department asserted, any general interest in the performance of assessment work. The statute and the Department's regulations, its formal decisions, and more informal expressions, alike confirm the long-standing absence of any interest or power in that regard. The Government has unsuccessfully tried to establish a line of precedent, assertedly overlooked by counsel and the Court in *Virginia-Colorado,* under which the Government *did* assert an interest, and possess jurisdiction, in respect of the performance of assessment work on claims where the Government desired to put the land to other use. Both branches of that effort fall short. The Court and counsel in *Virginia-Colorado* were well aware of the supposed "precedents"; they had only recently been rejected as guides to decision in *Krushnic.* And they did not in fact represent a contrary line of applicable authority. See pages 66-70, 76-82, *supra.*

POINT III

To overrule *Krushnic* and *Virginia-Colorado* would do violence to thirty years of legislative reliance on the soundness of the decisions, would intrude upon the comprehensive consideration of the land laws now being given by the Public Land Law Review Commission, and would meet no need, for a continued recognition of the ineffectiveness of the assessment work decisions imposes no burdens on public land administration.

Beyond the considerations which, in principle, urge adherence to the statutory construction announced in the *Krushnic* and *Virginia-Colorado* decisions is the further fact that to depart from them would ignore the elaborate history of Congressional awareness and acquiescence in the result thus announced. It would involve a wrenching of the most clearly retroactive kind now to upset the premise for thirty-five years of legislative history—indeed, the Government, astonishingly, urges precisely the necessarily retroactive character which such a step would have as the reason for which this Court should undertake it (Brief, p. 64). A further reason for restraint which arises out of a consideration of the legislative role lies in the fact that the Congress has under present and active consideration a through-going revision of the public land laws, including the mining laws, with their provisions governing the requirement for assessment work and the question of the consequences of a failure to perform it.

In the same way, acceptance of the Government's argument that the decisions of this Court in *Virginia-Colorado* (and by necessary implication, *Krushnic,* as well) be over-

thrown, would bring, as another consequence, precisely the result in the Department's administration of the lands involved which the Government purports to fear: unsettling the established administrative practice. In advancing that contention, the Government misconceived the facts which show that consistency and reliability of administration—the touchstone for this argument (see Brief, p. 41)—will be served by precisely the contrary course; for successive Secretaries have acted for thirty years in the settled conviction that the old decisions were nullities.

A. Repeated efforts to overturn through legislation the statutory construction announced in the *Krushnic* and *Virginia-Colorado* decisions have failed of enactment; and a judicial overthrow of that doctrine would impinge upon pending Congressional review of public land legislation.

In considering the Government's argument here that this Court's unanimous decisions in *Krushnic* and *Virginia-Colorado,* themselves reaffirmations of settled law, should be overthrown and a contrary statutory interpretation now promulgated, it is appropriate to give weight to intervening legislative activity, which will be briefly described.

After this Court's ruling in *Krushnic,* Congress in 1930 and 1931 considered legislation that would have required assessment work be performed to avoid forfeiture of claims, as well as compromise proposals that would have made the assessment work requirement applicable only from a future date and would specifically have precluded Interior from complaining of defaults occurring prior to that date. Interior was then energetically pressing such

complaints and was reluctant to compromise,[136] and no compromise was enacted.

After this Court's ruling in *Virginia-Colorado,* Interior in 1936 began working on proposed legislation to require oil shale claim owners to do assessment work or forfeit their claims. See Pl. Ex. 188; R. 2043-2045. Such proposals were urged upon the Congress in 1939,[137] again in 1941 (Pl. Ex. 192; 211-212)[138] and in 1943 (Pl. Ex. 194; A. 213-215; Pl. Ex. 195; A. 216-217). Hearings were held on these proposals[139] but no satisfactory compromise as to how to change the law could then be reached.

The impetus for Interior's efforts to secure legislation came from the supposed difficulties of administering the Taylor Grazing Act on lands covered by unpatented oil shale claims. In 1945 Interior, noting that the desired

136. See Consolidated Hearings before the House Committee on Public Lands, *"Applications for Patent on Oil-Shale Lands,"* on H.R. 3754, H.R. 12802, H.R. 13191, H.R. 15002, H.R. 15130, H.R. 15131, H.R. 15132, Parts 1, 2 and 3, at pp. 44, 93, 95, 107-112, 115-116 (71st Cong., 2d and 3d Sess., 1930-31).

137. See Pl. Ex. 6; A. 68-69; H.R. Rep. No. 939 (on H.R. 6560), June 22, 1939 (76th Cong., 1st Sess). Secretary Ickes wrote Senator Murdock on July 25, 1941, that H.R. 6560 "was introduced at the request of the Department for the purpose of obtaining authority to clear up certain claims which . . . were saved by section 37 of the [Mineral Leasing] Act and because of a deficiency in the law it has not been possible to require that they be either developed or abandoned. The bill was passed by the House but because of amendments by the Senate Public Lands Committee which would have made the measure of questionable value it failed of enactment." Pl. Ex. 192; A. 211. Secretary Ickes then suggested that the matter be included in the hearings to be held pursuant to S. Res. 53, which it was. See n. 139 below.

138. The date of July 25, 1947 appearing at p. 211 of the Appendix is a typographical error for 1941. See R. 2050.

139. See Hearings Pursuant to S. Res. 241 (76th Cong.) before a Subcommittee of the Senate Committee on Public Lands and Surveys, Part 5, pp. 1957-1961; Part 13, pp. 3766-68, 3748-3785 (1942, 1943, 77th Cong., 2d Sess.).

legislation had not been enacted, determined that the difficulties could be overcome instead by administrative action.[140] Interior asserted the authority to regulate grazing on unpatented oil shale claims, received judicial support,[141] and has not encountered subsequent difficulty in that regard.

After the *Union Oil* decision of 1964 (71 I.D. 169), legislation to forfeit mining claims for nonperformance of assessment work was again introduced in the Congress.[142] In the interim period of accommodation, however, Interior had supported and Congress had in 1956 enacted a statute to facilitate the patenting of oil shale claims, legislation which imposed no requirement with respect to assessment work.[143] Moreover, two years later Congress made substantive amendments to the assessment work statute but gave the United States no rights in the premises. Act of Sept. 2, 1958, 72 Stat. 1701, 43 U.S.C. 28-1, 28-2.

In 1964, Congress determined that

> Because the public land laws of the United States have developed over a period of years through a series of acts of Congress which are not fully correlated with each other and because those laws, or some of them, may be inadequate to meet the current and future needs of the American people . . . , it is necessary to have a compre-

140. See Pl. Ex. 63; A. 113-116.

141. See *United States* v. *Etcheverry*, 230 F. 2d 193 (10th Cir. 1956).

142. H.R. 894, A Bill To Modernize the Mining Laws of the United States (89th Cong., 1st Sess., 1965).

143. Act of July 20, 1956, 70 Stat. 592, 30 U. S. C. 122. See S. Rep. No. 2524 (84th Cong., 2d Sess.); H.R. Report No. 2198 (84th Cong., 2d Sess.).

determinations are called in question by any decision here. There is no basis for the suggestion. It is said that the Secretary must be able to rely on his records. But if the record reflects a decision which it is known has no consequence (and it is the unquestioned evidence here that it was notorious within the Department that the oil shale assessment decisions were to be ignored), there is no administrative difficulty.

The contention that the cancellations served a basic public policy of clearing the land of "abandoned claims to facilitate their use in the public interest" (Brief, p. 42) is no better founded. It has not been policy in the public interest to clear the public lands of claims by contesting them on a ground which the Department lacks jurisdiction to advance. Moreover, abandonment has heretofore been thought a charge of which notice and an opportunity for a hearing is required. And the suggestion, that it was after effectively cancelling the claims that the Secretary "moved to promote those [other] uses," incorporates the wholly false implications that the Secretary thought that the decisions had effectively disposed of the claims and that the purported cancellations and other public land programs had a causal relationship.[149] The land within the

149. The contention is illogical as well as bad history. The post-*Krushnic* contest notices originally asserted that the United States "has taken possession . . . for purposes of holding for lease" under the Mineral Leasing Act (*e.g.*, Pl. Ex. 16; A. 71). Before any decisions were rendered, however, the withdrawal of April 15, 1930 had occurred (Executive Order No. 5327), and the field division was instructed to amend the notices so as to omit reference to the leasing act and to allege that the United States had taken possession "for its own uses and purposes" (Pl. Ex. 18; A. 73-74). The claims were not cancelled in 1931 to promote other specific uses. The 1930 withdrawal was not amended to permit oil and gas leasing until 1933 (Executive Order No. 6016, February 6, 1933). The Taylor Grazing Act, 48 Stat. 1269, 43 U.S.C. 315, was of course enacted only in 1934. The Naval Oil Shale Reserves, referred to at p. 43 of the Government brief, include no portion of the claims here.

claims had of course been subject to oil and gas leasing *prior* to the assessment work contests, just as it was after the 1930 withdrawal was amended to permit a resumption of leasing for that purpose.[150] This history, which shows that in fact there was no relation between the assessment work contest decisions and oil and gas leasing, is heavily fortified by the Secretary's answers to interrogatories in this action that those leases were not issued in reliance upon the assessment work decisions (see pages 61-62, *supra*). Similarly, the grazing leases to which the Government's brief refers have issued without consideration of the effectiveness of assessment work decisions.[151]

The Government next suggests that if the claims were not effectively cancelled wholesale, they must be proceeded against individually in time-consuming and expensive contests. From one perspective this has no more meaning than it would to say that unless all red-haired suspects arrested by the police are presumed guilty it will be necessary to spend much time and effort in securing individual convictions. That of course is true, if not persuasive. The

150. While noting (Brief, p. 43) the issuance of oil and gas leases, the Government omits to note that most of those leases have either expired or were issued after the commencement of this action (Deft. Ex. GG, GG-1, GG-2; R. 7946-7947). The first oil and gas lease applications on any of the claims here in suit, on the Government's own statement, were filed only in 1951 (Supplement, pp. 156, 162, and 166), save for one lease application filed in 1945, and then withdrawn, for lands within some of the Camp Bird Claims (p. 166).

151. If further evidence is needed, it should also be noted that oil and gas leases and grazing permits have issued for lands within unpatented oil shale claims that have *never* been the subject of supposedly final assessment work decisions. See, *e.g.*, the four "Compass" claims involved in the *Napier* case. Three of the four were purportedly cancelled for default in performance of assessment work, whereas on the fourth, the Southwest claim, sufficient work was held to have been done and the claim was sustained on the merits. Oil and gas leases and grazing permits issued covering portions or all of all four claims. See Deft. Ex. E-E, I-I; R. 7943, 8069-8225.

argument is irrelevant in another sense, as well. It is advanced, it may be noted, in the course of the portion of the Government brief directed to the point that the decisions should not be held to be *void* because rendered in excess of jurisdiction. The argument made has no bearing on the topic under which it is presented. If the assessment work decisions are merely *erroneous*, they may be successfully set aside on direct review, and, equally if the decisions are set aside because void, the claims must be attacked in further contest proceedings. And even if neither void nor erroneous the decisions have no consequence, by the Secretary's own admission, to the extent of procedural errors made in the course of them.

The Government makes light of the procedural point material to many of these contests: the failure to effect service of notice of the contest. The extent of that failing, however, was large. Its dimensions are suggested by the fact that of the 257 oil shale claims that *were* involved in *Union Oil*, as those here were not, the Secretary himself has held that personal service was wholly defective as to 117, and partly so as to a further 101. *Union Oil Company of California, Supplemental Decision*, 72 I.D. 313 (1965). As to 218 of the 257 claims involved in the Departmental litigation—85% of those involved, there thus remain further issues to be tried on contest proceedings whatever the merits of the assessment work contest decisions. And contrary to the Government's reiterated statement that the Secretary has held that claims in contests with defective service "are subject to reopening as to any locator" not served (Brief, p. 29, n. 14), what the Secretary in fact has said is that to the extent of such defective service the old decisions were "without effect" or "had no effect". See,

e.g., 72 I. D. at 338.[152] One need not, that is, apply to the Secretary to "reopen" anything.

Lastly, the Government argues that if the decisions continue to be regarded as void, it would not be appropriate to conclude that a failure to respond in the contests or to resume assessment work constituted an abandonment of the claims. If, however, "there were a color of authority to [the Secretary's] actions", a different conclusion would be possible (Brief, p. 44). What "color of authority" could be given to the Secretary's actions under the language of the *Virginia-Colorado* decision which held in terms that what precisely the Secretary lacked was "authority" is

152. The Supplement to the Government's Trial Brief in the District Court, reprinted here as a supplement to its brief in this Court, shows that there were extensive interests in each of the claims in suit as to which the 1931 decisions in suit were thus "without effect." As the plaintiffs noted in their brief in the Court of Appeals, there was agreement as to the extent of ineffectiveness of the decisions for this reason, with the single exception that the Government supposed (see p. 125 of the Supplement) that the files in Contest 11761 contain a registry receipt dated July 17, 1931, signed by Stephen A. Post, the owner of a one-eighth interest in the Camp Bird claims. Under the principles stated in the supplemental *Union Oil* decision, that would have constituted effective service. In fact, the contest files contain no such receipt.

Correcting the Government's statements for that one, obviously inadvertent, error, it was common ground between the parties that the prior decisions were ineffective, on this procedural ground alone, to the following extent:

Contest 11757: the adverse decisions in Contest 11757 against the Bute claims were ineffective as to 11/16 of each of the Bute Nos. 1, 4-8, 11, 13-17, 22-26, 31-35, 38, 40-44, and 47; as to 12/16 of each of the Bute Nos. 2, 10, 19, 28, 37, and 46; and as to 13/16 of each of the Bute Nos. 3, 9, 12, 18, 21, 27, 30, 36, 39, 45, and 48.

Contest 11759: the adverse decisions in Contest 11759 against the Atlas claims were ineffective as to 7/16 of each of the Atlas Nos. 1-3, 7, 10, 12, and 18; and as to 9/16 of each of the Atlas Nos. 9 and 17.

Contest 11761: the adverse decisions in Contest 11761 against the Camp Bird claims were ineffective as to 12/16 of each of the Camp Bird Nos. 1-20.

impossible to perceive, whether the decision be read as going to subject matter jurisdiction or not.[153] Under either reading it is clear that an inference of abandonment cannot be based simply upon a failure in the midst of the Depression to contest a charge which the Secretary himself conceded would be subject to court test, and which, when that test reached this Court, was held beyond his authority to advance. It is equally clear that the question of discovery on oil shale claims, which although a subject neither of trial nor appeal below the Government adverts to (p. 45), is unaffected by any decision here. The Government presumably suggests—the meaning of note 18 is hardly clear—that a failure to respond to the contest or to perform assessment work is relevant to the question of the value which oil shale claims then had. Passing a number of relevant matters, of which the Depression is not the least significant, it must be obvious that the Secretary's subject matter jurisdiction can hardly be *assumed* to have been a material motivating force. Even were it now for the first time to be decided that he had in fact then possessed the power, any inference about a *perception* of value, which is what the Government necessarily must be talking about, would depend upon whether people then *thought* that he had subject matter jurisdiction. If they *thought* he did not, and that the contest proceedings were therefore nullities, their failure to resist them by hiring lawyers to go to Washington to appeal to the Secretary or to sue him in court,[154] would not prove a lack of appre-

153. This suggestion in the Government's brief assumes drastic alterations, in any event, in the well-established law of abandonment.

154. Prior to the Mandamus and Venue Act of 1962, 76 Stat. 744, 28 U.S.C. 1361, 1391(e)(1964), the Secretary could be sued only in the District of Columbia. See Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 Harv. L. Rev. 308 (1967).

ciation of value, even if they were now to be characterized as having been wrong in that view.

If the consistency and reliability of the administrative process have the importance claimed for it, the decisions below, not the Government's contentions, demand respect.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

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ment of the Mineral Leasing Act (Supp. Brief 81). They were the subject of a contest proceeding, Contest No. 12029, initiated by the Department of Interior against the claimants in 1929. The claims were declared invalid in 1930 for failure to perform annual assessment work. (A. 343) On September 8, 1959, respondents filed application for mineral patent (Colo. 03079). This application was rejected by the Manager of the Colorado Land Office, Bureau of Land Management, and the decision was affirmed by the Solicitor of the Department on April 17, 1964, in *Union Oil Company of California*, 71 I.D. 169. (A. 352, 375)

On July 31, 1964, respondents filed an action in the United States District Court for the District of Colorado seeking a declaration that the decision of the Solicitor was void and seeking a mandatory injunction compelling the Department to take such action as is necessary to issue the patents. (A. 342, 351)

The District Court declared the decision of the Solicitor to be void. *Oil Shale Corporation v. Udall*, Colo., 261 F. Supp. 954. The Tenth Circuit affirmed, *Udall v. Oil Shale Corporation*, 406 F. 2d 759.

ARGUMENT

A. THE SECRETARY LACKED JURISDICTION TO DECLARE CLAIMS INVALID FOR FAILURE TO PERFORM ASSESSMENT WORK.

The question in this case is whether the Secretary of Interior had authority to void a mining claim for failure of the mineral locator to perform annual assessment work. If such authority did not exist, the action taken by the Secretary in 1930 was void, and the decision below was correct.

In 1930, this Court held that the Secretary could not cancel a claim for failure to perform annual assessment work. *Wibur v. Krushnic*, 280 U.S. 306. In 1919 Krushnic located some oil shale claims in Garfield County, Colorado.

In 1922, he applied for a patent on the claims. The Commissioner of the General Land Office in a proceeding against the entry held the claim void upon the sole ground of insufficient assessment labor for the year 1920. The Court set forth the established law on the rights of persons who had stacked a mineral claim, Page 316:

> "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that, when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property,' subject to the lien of a judgment recovered against the owner in a state or territorial court.*** The owner is not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, the possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not ipso facto forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation."

The government ignored the *Krushnic* decision and continued to cancel hundreds of oil shale claims in Colorado, solely on the ground that annual assessment work was not done. For this reason this Court again had to rule on the power of the Secretary to cancel on that ground. *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639. In reviewing the extent of the authority of the Secretary, it was said, page 645:

> "There was authority in the Secretary of the In-

terior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment.***"

However, on the question of the power of the Secretary to invalidate a claim for failure to do annual assessment work, the Court said, page 647: [Emphasis supplied]

> *"We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law."*

This Court clearly held that the Secretary was without authority to cancel the oil shale claims on the ground of failure to perform annual assessment work. If he was without such authority, then the cancellations in 1930 by the Secretary of the subject claims was of no effect, and the 1964 rejection of the patent application was improper.

The Secretary finally acceded to the Supreme Court and implemented the law set forth in *Virginia-Colorado*. In *The Oil Shale Company*, 55 I.D. 287 (1935), the Commissioner had denied a patent application for failure of assessment work. The First Assistant Secretary reversed the decision and remanded the case with instructions to reinstate the application and to dispose of it unaffected by default in the performance of assessment labor. The Assistant Secretary said that "the challenge to the valid existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings and the decision set forth in the Bill went beyond the authority conferred by law." He concluded that: "The above-mentioned decisions in the cases of *Francis D. Weaver and Federal Oil Shale Company and other department decisions in conflict with this decision are hereby overruled.*" [Emphasis supplied]

One of the conflicting decisions overruled was, therefore, the 1930 cancellation of the claims owned by these respondents; and there can be no proper claim of res judicata.

Thereafter, the Department of Interior followed the law in *Virginia-Colorado*. Thus, in a letter dated June 28, 1935, Commissioner Fred W. Johnson said: (A. 43)

> "It is possible if you left your claims in 1925 and have not since performed assessment work thereon that they have been relocated, but as also stated in the paragraph referred to, 'The determination of the question of the right of possession between rival or adverse claimants to the same mineral land is committed exclusively to the court.' Matters of trespass, thievery, etc., such as those referred to in your letter, are also committed to the jurisdiction of the court, being punishable only under the laws of the state. As this office has no jurisdiction in the matters mentioned in your letter it will not undertake to advise you in that regard."

Commissioner Johnson said on July 25, 1935: (A. 44) "Replying to your letter of July 20, 1935, you are advised that *this office has no jurisdiction over questions relating to the performance of annual assessment work on mining claims*, such questions being committed exclusively to the court. "[Emphasis supplied]

Secretary Chapman on February 11, 1946, said in a letter: (A. 44) "The failure to perform the annual assessment work for the benefit of a valid mining location has no effect as against the United States but only renders the claims subject to loss through relocation by another claimant if the work is not commenced or resumed before such relocation. Therefore, *the question of whether the work done is of a nature that would be considered assessment work is not one within the jurisdiction of this Department.*" [Emphasis supplied]

It was not until the decision in *Union Oil* in 1964, that the Department reversed itself and asserted that a mining claim could be voided for lack of assessment work. Clearly, the action of the Department in rejecting the patent appli-

cations on the basis of the 1930 cancellation was wrong. The Department did not have subject matter jurisdiction to cancel the claims. If it did have such jurisdiction, then the cancellation was overruled in *The Shale Oil Company*, 55 I.D. 287.

The decision below is correct.

B. VIRGINIA-COLORADO SHOULD NOT BE OVERRULED.

The government contends that this Court should overrule *Krushnic* and *Virginia-Colorado*. It is said that under the law existing prior to the date of those decisions, the government *did* have the right to forfeit claims for failure of annual assessment work. This is incorrect and the Department itself was aware of the state of the law. Secretary Lane in a letter dated October 23, 1918, stated: (A. 43)

> "I am in receipt of your letter dated October 2, 1918, and making inquiry as to the necessity for performing annual assessment work on some oil shale lands in Wyoming, which you and associates are claiming under placer mining locations made in 1917 and 1918.
>
> ***
>
> "As a general rule matters involving questions of assessment work on mining claims arise between adverse claimants to the same mineral land and go only to the right of possession, the determination of which is committed exclusively to the courts."

First Assistant Secretary Vogelsang wrote on January 20, 1919: (A 43)

> "The annual expenditure on unpatented mining location required under Section 2324 U.S. Revised Statutes, and commonly called annual assessment work, is, with the exception of certain phosphate locations affected by a special act of Congress, solely a matter between rival and adverse claimants to the same

mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts. In other words, the non-performance of assessment work renders the land subject to adverse relocation provided work is not resumed. (40 Stat. 343)."

Clearly the law has always been that annual assessment work is not a necessary element of a valid mining claim. If a claim is otherwise perfected, the locator has a property right, which right does not terminate upon failure to perform assessment work. The only defeasance of the right could come from another locator. In *Belk v. Meagher*, 104 U.S. 279, the rule is clearly announced that mere failure to do assessment work does not terminate the locator's right of possession, until there has been an interruption by the intervention of a relocator. See also *Forbes v. Gracey*, 94 U.S. 762; *Bingham Amalgamated Copper Co. v. Ute Copper Co.*, 181 F. 748; *North Noonday Mining Co. v. Orient Mining Co.*, 1 Fed. 522. As said in *Krushnic*, a mining claim is property in the fullest sense of the term.

Nor did the Mineral Leasing Act of 1920 change the state of the law, as held in *Krushnic* and *Virginia-Colorado*. That Act did not grant to the Department the right to cancel claims for failure to perform assessment work. The government's "newly discovered" legislative materials are not persuasive that this Court misconstrued the Act. It would seem that the Supreme Court in 1930 was in a good position to determine what Congress intended in 1920. The passage of time to 1970 cannot have changed that intent.

The government in its brief and supplemental brief refers to the claimants and their predecessors as speculators. A contrary view was expressed by a member of Secretary Udall's Oil Shale Advisory Board and former Regional Administrator of the Bureau of Land Management for Colorado and Utah. H. Byron Mock states in 43 Denver Law Journal 51: "Probably most impressive to me was the large number of dedicated mining men who had

sunk every available dollar into development and retaining and patenting oil shale claims. Even then sons of those original pioneers were succeeding to the struggle as the original pioneers began to die off. Today only a few of those original dedicated working dreamers still survive. Neither they nor we public officials of those days knew or suspected that their claims were then null and void for procedural reasons and that the revelation would be forthcoming in 1964, notwithstanding the even then 'long established administrative practices.' "

The government must bear a major part of any blame for slow development of shale oil. Immediately after the passage of the 1920 Mineral Leasing Act, the Department began its campaign of cancellation of the claims for lack of assessment, and it was not until 1935 that it finally quit. Certainly, this prevented any development on most unpatented claims. There was, of course, renewed interest in shale oil after World War II. But here again, the government impeded development by another attempt to cancel claims on assessment grounds. Respondents here applied for a patent in 1959, and as yet have not had a hearing on their application. We don't suggest that whether there is a booming oil shale industry has anything to do with the merits of this action. To the contrary, the government's comments on this appear to be irrelevant.

It is suggested by the government that administration of the "Public" lands would be made easier if its wholesale cancellations of claims were allowed to stand by this Court. No doubt it would be easier. But that is hardly any justification for an illegal forfeiture of property rights.

It may be, as the government says, that the Virginia-Colorado decision has presented problems to the Department in the performance of its duties. But neither problems nor the passage of time are any justification for overruling of that decision. The solution to problems must come from Congress, not the Judiciary.

CONCLUSION

The judgment should be affirmed.

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Miscellaneous: Page

Applicability of the Mining Laws, etc., 50 L.D. 650 6
Congressional Directory (1 ed. 1938) 8
84 Cong. Rec. 8729 8
H.R. 6560, 76th Cong. 1st sess. 8
H. Rep. No. 939, 76th Cong., 1st Sess. 8
S. Rep. No. 1610, 83d Cong., 2d Sess. (1954) .. 6
Challenge to Validity of Mining Claims in National Parks, 53 I.D. 491 9
Proceedings Against Mining Claims Within the Area of the Boulder Dam Project, 53 I.D. 228 9
Widman, Brightwell & Haggard, *Legal Study of Oil Shale on Public Lands* (1969) 6, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 221

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

1. The respondents' principal emphasis in their main brief is on the proposition that the 1928–1931 administrative decisions are now properly before this Court on *direct* review. But in their opposition to the government's petition for a writ of certiorari in this Court they correctly stated that "the only issue passed upon by the district court and the court of appeals" was whether those "decisions were rendered in excess of the subject matter jurisdiction of the Department." Brief in Opposition for Respondents The Oil Shale Corp. and Brown, pp. 20–21. The only questions presented by the government in its petition were the issue of subject matter jurisdiction, and the subsidiary

question whether *Virginia-Colorado*[1]—on which resolution of that issue depends—was correctly decided. Pet. 2, 15; Reply 2–3. Of course, much of respondents' argument goes to the question whether *Virginia-Colorado* should be overruled or limited, and as such is entirely responsive; but the direct review proposed is a ground not passed upon by the courts below.

A petition for direct review made over thirty years after the proceeding sought to be reviewed is so extraordinary that it would seem no showing of prejudice need be undertaken. See *Wetzel* v. *Minnesota Railway Co.*, 169 U.S. 237; *Russell* v. *Todd*, 309 U.S. 280; *Davidson* v. *Grady*, 105 F. 2d 405, 408 (C.A. 5); *Gersten* v. *United States*, 364 F. 2d 850, 852 (Ct. Cl.). In any event, it is not necessary to show specific reliance on the particular decision invalidating the claims in order to establish an equitable basis for denying direct review. There is the wholly separate factor—equally a form of "prejudice" to the government, justifying denial of direct review—that the passage of years has obliterated much of the evidence by which the claims might now be judged. *Russell* v. *Todd*, *supra*, 309 U.S. at 287. It was in anticipation of this important consideration that the proceedings were brought when they were. *The Federal Shale Oil Co.*, 53 I.D. 213, 216. The very volume of those proceedings, in addition to substantial documentary evidence (A. 70–78; Supp. 15, 25; *Federal Shale Oil Co.*, *supra*, 53 I.D. at 215), makes clear that only assessment work issues were raised in the *Virginia-Colorado* proceedings.

[1] And, if required, *Krushnic*. Pet. Br. p. 48, n. 21.

Moreover, while no statute of limitations *now* applies, one arguably did in the years prior to 1962. Until that year, jurisdiction over the Secretary could have been obtained only in the District of Columbia, where a three-year statute of limitations applied to all claims not otherwise provided for. 12 D.C. Code 201. That time had already run, as to all of the claims in this case, before the June 3, 1935 decision of this Court in *Virginia-Colorado.* Supp. 112, 117, 124, 132, 137, 143. Even if not directly applicable, compare *United States ex rel. Arant* v. *Lane,* 249 U.S. 367, it provides some basis for determining when laches has occurred. *Russell* v. *Todd, supra,* 309 U.S. at 288–289. A lapse of less than seventeen months was involved in *Coleman* v. *United States,* 363 F. 2d 190, 196 and n. 5 (C.A. 9), adhered to on rehearing, 379 F. 2d 555, reversed on other grounds, 390 U.S. 599.

Finally, while TOSCO insists that its predecessors in interest in the Bute, Atlas and Camp Bird claims were under no obligation to exhaust administrative remedies before perfecting an appeal from the default judgments entered against them—and therefore that TOSCO, having bought their rights, may take such an appeal now [2]—it is striking that the other claimants

[2] TOSCO purchased its interests in the Bute, Atlas and Camp Bird claims after the initial assertion of the assessment work cancellation grounds for refusing patent in 1962. Supp. 54–55, 67, 68, 75, 80. If the Secretary acted without subject matter jurisdiction in the 1930's, its purchase was of land rights (the oil shale locations) which, whether or not invalid for other reasons, the Secretary's action had not affected. If he acted within his subject matter jurisdiction, but in error, however, its purchase was only of a chose in action—the claim to relief

did respond and resist the Department's actions. Compare Supp. 111, 112, 117, 124 with Supp. 129, 135–136, 140–141. In good part, the distinction between "collateral" and "direct" review draws on the fact that failure to respond to judicial or administrative process or decision is more likely to signify acquiescence or abandonment of claim than to show a simple concession of factual issues in order to test out legal questions in a higher court. TOSCO's implicit hypothesis that the claimants who subsequently quitclaimed their interests to Mr. Ertl for pennies per acre were merely waiting to see what this Court would decide in *Virginia-Colorado* is thus questionable at best. To permit one who does not even respond to process to challenge the legal as well as the jurisdictional basis of administrative action even after the fact, would be to permit avoidance of the obligation of response to the agency in a significant number of cases, and to facilitate

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from the error and reinstatement of the claim. Congress has specifically provided that there can be no assignment of claims, 31 U.S.C. 203, or contracts, 41 U.S.C. 15, involving the United States except under specified special circumstances of which this does not appear to be one. Indeed, in this context, application of the forfeiture technique to secure the interests of co-owners who have not contributed to assessment work appears equally suspect. If the claims were effectively cancelled by the Secretary, however erroneously, there would be not only no requirement, but no right to perform assessment work upon them.

Of course, respondents argue that the Secretary's actions after *Virginia-Colorado* did restore the claims. But that is a contention which they do not ask this Court to reach now, and which will be open on any remand. And if that contention is resolved in respondents' favor, it will no longer be necessary to entertain their claim to direct review.

sharp practice with claims as to which the real reason for non-response was either abandonment-in-fact, or acquiescence in legal principles the agency had the power to decide.

Thus, we do not believe review on non-jurisdictional legal issues is available to respondents at this time. But even if they are entitled to review unless the government can show an impediment in the nature of laches, the question whether such an impediment exists was never passed on below. If necessary, it should be remanded to the lower courts rather than decided for the first time in this Court.

2. While we did characterize our reading of *Virginia-Colorado* as "*somewhat* tortuous" as compared to outright overruling (Br. p. 47; emphasis added), that reading has one virtue which respondents' discussion entirely lacks: it gives some content to the statutory requirement of maintenance. Section 37 of the Leasing Act did not, after all, save existing valid claims in an absolute sense; it saved them only if they were "thereafter maintained." 41 U.S.C. 193. Whether or not it was a sensible conclusion in terms of prior mining law, this Court found that the *Virginia-Colorado* claims were being maintained because the claimants had responded to the Secretary's process with an offer to resume assessment work. 295 U.S. at 646. That offer fully distinguishes most if not all of the claims involved in the present cases.[3]

[3] In particular, there was a complete failure of response regarding the Bute, Atlas and Camp Bird claims, which represent 13,760 acres, or about 75 percent of the area subjected to the cancellations involved in this case. Supp. 61, 70, 76, 82, 90, 95.

Respondents' only suggestions as to what the "maintenance" requirement might have meant are (1) that possibly relocation could have been effected by claimants of minerals which were not subject to the Leasing Act—an issue which they state was never litigated; (2) that among co-owners of a particular possessory right, the possibility of forfeiture of interest to a co-owner who volunteered assessment work to which the others did not contribute was a sanction encouraging the performance of assessment work. But the possibility of relocation for non-Leasing Act minerals *was* settled, adverse to respondents' suggestion, as early as 1924. *Applicability of the Mining Laws, etc.*, 50 L.D. 650; *Joseph E. McClory*, 50 L.D. 623; Widman, Brightwell & Haggard, *Legal Study of Oil Shale on Public Lands* (1969) 243 and 248 n. 3. The Leasing Act in express terms withdraws from location not just the deposits of the minerals involved but "the lands containing such deposits," 30 U.S.C. 181. The Multiple Mineral Development Act of 1954 was enacted explicitly to remove that barrier, since much of the land concerned had subsequently proved valuable for uranium.[4] *E.g.*, S. Rep. No. 1610, 83d Cong., 2d Sess. (1954) 1 ("[L]and * * * known to be valuable for * * * Leasing Act minerals, could not be located under the mining laws.")

[4] Respondents suggest that their post-154 assessment work served to protect their claims from relocation under the 1954 Act. TOSCO Br. 14 n. 27; 30 U.S.C. 525(c). The argument would be more convincing if the record showed such work to have been done in every year since 1954. From what appears, work was done only to the extent necessary to justify forfeiture and qualify for patent. Supp. 68–69, 75, 81, 89, 93, 102.

Between 1920 and 1954, then, an oil shale claimant could be quite sure that no one would be able to relocate his claim. Once *Virginia-Colorado* had been decided, there was no longer any possibility of loss to an outside claimant through failure to do assessment work and hence no pressure whatsoever to "maintain" it—even though the statute did require maintenance as a condition of continuing validity. Since no outsider could take over the claim, any assessment work that was done was volunteered. That such volunteer work could nonetheless support a forfeiture as between insiders was not decided, as a matter of Colorado state law, until 1961, and then over vigorous and persuasive dissent. *Hamilton* v. *Ertl*, 360 P. 2d 660. In any event, such work does not "maintain" the claim, for the claim merely changes hands within the claimant group; any pressure is not to do the volunteer work, but to contribute ratably to its cost once it has been done.

Thus, while respondents accuse the government of reading too much into the maintenance clause, they in effect would read it out of the statute; for as they construe it, the holder of "valid claims existent on February 25, 1920" was under no greater obligation than he would have been had the reference to maintenance thereafter been completely omitted. As we have shown at length in our main brief, while Congress was undoubtedly anxious to preserve the existing rights of the diligent (and the quoted passage from Congressman Taylor, TOSCO Br. p. 93, proves

no more),[5] it had no purpose to confer the boon of unassailable right on the slothful and the speculator.[6]

[5] Addressing the House 19 years later in support of H.R. 6560 (76th Cong.), on which respondents also rely, TOSCO Br. 110 n. 137, the *same* Congressman Taylor (*Congressional Directory* (1 ed. 1938) 14) stated:

> Mr. Speaker, this applies to about 30,000 acres of oil-shale land, nearly all in my home county. People have been holding it for years and years without complying with the [assessment work] law and without being entitled to it. This is to require them to comply with the law or else let the land revert back to the control of the United States. * * *
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> * * * * *
>
> MR. CASE of South Dakota. Are they not subject to existing laws so that they can be ousted?
>
> MR. TAYLOR of Colorado. No. *The courts have held* that cannot be done. They have been holding these lands for years and paying nothing. They prevent anybody else from getting the land. [84 Cong. Rec. 8729 (1939); emphasis added.]

Of course, as stated in our main brief, p. 64, we cannot deny the existence of such legislative efforts. None of which we are aware, however, would or could have given any effect to the assessment work lapses of 1920–1935 once *Virginia-Colorado* had been decided. *E.g.*, H. Rep. No. 939, 76th Cong., 1st Sess. (1939) 2–3. And since this Court had stated that the claimants had vested property rights in valid claims, serious constitutional doubts may have attended any effort to alter their obligations even prospectively.

[6] The present reading of the assessment work statute leads to other problems. There is no way to quickly and easily determine whether an owner remains seriously interested in developing his claim, or has decided to maintain only a nominal investment. In cases where land is not subject to a withdrawal order, such a determination is far more simple. If the work has not been performed, the claimants' rights are subject to termination on a relocation by others. But on withdrawn lands, where no one has the power to relocate, a claim interest remains valid until the government assembles sufficient evidence to challenge the claim on the basis of abandonment. What was formerly a moderately efficient system permitting termination of rights in unattractive claims, with the moderate cost burden of showing validity imposed on the claim owner, has been

Willingness in these exceptional cases to confer title in return for $500 qualification work and $2.50 per acre hardly shows an intent to confer the practical equivalent of title—an *indefeasible* possessory right—for no consideration at all. Rather, the maintenance requirement must be given at least the minimal content implicit in *Virginia-Colorado,* if not the meaning given to it by the Secretary in the proceedings leading to that case. Otherwise, the Act will have been read not merely to have preserved existing rights, but rather to have created possessory rights of a nature never before encountered under the mining laws—rights entirely inconsistent both with the new policy embodied in the Leasing Act and with the clear congressional anticipation of diligence manifest throughout the legislative history.

3. Respondents take issue with our characterization of the pre-Leasing Act administrative rulings as establishing that where land was withdrawn for public use *without possibility of relocation,* the requirement that claims be maintained by assessment work could be used by public authorities to recapture it for that use. The cases they cite are readily distinguished, however. *Proceedings Against Mining Claims Within the Area of the Boulder Dam Project,* 53 I.D. 228, and *Challenge to Validity of Mining Claims in National Parks,* 53 I.D. 491, were both decided in the shadow of *Krushnic.* And the several homestead cases cited at

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transformed, in the case of withdrawn lands, into an inefficient system which, if other claim requirements have been satisfied, imposes on the government the burden of proving an abandonment case.

Widman, Brightwell & Haggard, *op. cit. supra,* 326–327.

INDEX

	Page
I. Direct Versus Collateral Review	1
A. Direct review	1
B. Collateral review	6
II. The Meaning of the Maintenance Requirement	9
A. Respondents' suggestion makes the maintenance requirement ineffective	9
B. By requiring that existing valid claims be "thereafter maintained," Congress understood that annual assessment work would have to be done	12
III. Other Issues	20
Appendix	21

CITATIONS

Cases:

Best v. *Humboldt Mining Co.*, 371 U.S. 334	7
Cameron v. *United States*, 252 U.S. 450	7
Chicot County Drainage District v. *Baxter State Bank*, 308 U.S. 371	6
Coleman v. *United States*, 363 F.2d 190, adhered to on rehearing, 379 F.2d 355, reversed on other grounds, 390 U.S. 599	4
Davidson v. *Grady*, 105 F.2d 405	2
Donnelly v. *United States*, 228 U.S. 243	14
Gabbs Exploration Co. v. *Udall*, 315 F.2d 37, certiorari denied, 375 U.S. 822	3, 4, 5

Cases—Continued	Page
Gersten v. *United States*, 364 F.2d 850	2
Hamilton v. *Ertl*, 146 Colo. 80, 360 P.2d 660	11
Ickes v. *Virginia Colorado Development Corp.*, 295 U.S. 639	2, 3, 4, 5, 9, 10, 11, 14, 18, 19, 20
Knight v. *United States Land Assn.*, 142 U.S. 161	7
Michigan Land and Lumber Co. v. *Rust*, 168 U.S. 589	7
National Labor Relations Board v. *Rockaway News Co.*, 345 U.S. 71	6
Russell v. *Todd*, 309 U.S. 280	2, 3, 4
The Federal Shale Oil Co., 53 I.D. 213	3
Union Oil Co. v. *Smith*, 249 U.S. 337	14, 20
United States ex rel. Arant v. *Lane*, 249 U.S. 367	3
United States v. *Estate of Donnelly*, 397 U.S. 286	6
West v. *Standard Oil Co.*, 278 U.S. 200	7-8
Wetzel v. *Minnesota Railway Co.*, 169 U.S. 237	2
Wilbur v. *Krushnic*, 280 U.S. 306	2, 14
Statutes and rules:	
Mineral Leasing Act of 1920, 41 Stat 437 *et seq.*:	
30 U.S.C. 181	10
30 U.S.C. 193	9, 17, 18
30 U.S.C. 241(a)	17
30 U.S.C. 525	10
Multiple Mineral Development Act of 1954, 68 Stat. 708, 30 U.S.C. 521, *et seq.*	10

Statutes and rules—Continued Page

Act of May 10, 1872, 17 Stat. 91 17
Act of March 2, 1907, 34 Stat. 1243 15
Act of January 11, 1915, 38 Stat. 792 16
31 U.S.C. 203 4
41 U.S.C. 15 4
12 D.C. Code 201 3
Rule 74, 51 I.D. 547 6
Rule 75 of the Rules of Practice, 51 I.D. 547 5

Miscellaneous:

Applicability of the Mining Laws, etc., 50 L.D. 650 10
Circular 460, *in Contests on Report by Representatives of the General Land Office*, 44 L.D. 572, para. 10 6
Congressional Directory, (1st ed.) 14 18
Cong. Globe, 42d Cong. 2d Sess., Pt. 3 2459 (1872) 13
40 Cong. Rec. 2902, 2903 (1906) 16
84 Cong. Rec. 8729 (1939) 18
Challenge to Validity of Mining Claims in National Parks, 53 I.D. 491 14
Federal Shale Oil Co., The, 53 I.D. 213 3
Hearings Pursuant to S.Res. 241 (76th Cong.) Before a Subcommittee of the Senate Committee on Public Lands and Surveys, 77th Cong., 2d Sess. (1943), Part 5, p. 1954 18-19
H.Rep. No. 1020, 63d Cong., 2d Sess. 2 (1914) 16
H.R. 6560, 76th Cong. 18
McClory, Joseph E., 50 L.D. 623 10
Morris, James, 47 L.D. 326 15

Miscellaneous—Continued Page

Proceedings Against Mining Claims within the Area of the Boulder Dam Project, 53 I.D. 228 14
Procedure to Obtain Patent to Mineral Lands, 37 L.D. 763 13
Report of the Public Land Law Review Commission, *One-third of the Nation's Land* (1970) 19
Schmitz, Winfred S., 38 L.D. 587 15
S.Rep. No. 1610, 83d Cong., 2d Sess..... 10
Trask, Lizzie, 39 L.D. 279 15
Widman, Brightwell & Haggard, *Legal Study of Oil Shale on Public Lands* (1969) 10, 12, 14, 19

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 25

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S AMENDED REPLY BRIEF

Petitioner files this amended reply brief to replace the reply brief it submitted on January 16, 1970. The postponement of argument in the case has made possible this fuller reply, which both incorporates the previous reply and adds additional material. The prior reply brief may be treated as withdrawn.

I. DIRECT VERSUS COLLATERAL REVIEW

A. Direct review

The respondents' principal contention is that the 1928-1931 administrative decisions are now properly

before this Court on *direct* review. The contention does not withstand examination.

First, respondents correctly stated in their opposition to the government's petition for a writ of certiorari in this Court that "the only issue passed upon by the district court and the court of appeals" was whether those "decisions were rendered in excess of the subject matter jurisdiction of the Department." Brief in Opposition for Respondents The Oil Shale Corp. and Brown, pp. 20-21. The only questions presented by the government in its petition were the issue of subject matter jurisdiction, and the subsidiary question whether *Virginia-Colorado* [1]—on which resolution of that issue depends—was correctly decided. Pet. 2, 15; Reply 2-3. Of course, much of respondents' argument goes to the question whether *Ickes* v. *Virginia-Colorado*, 295 U.S. 639, should be overruled or limited, and as such is entirely responsive; but the direct review proposed is a ground not passed upon by the courts below.

A petition for direct review tendered more than thirty years after the proceeding sought to be reviewed is so extraordinary that no showing of prejudice need be undertaken in opposing it. See *Wetzel* v. *Minnesota Railway Co.*, 169 U.S. 237; *Russell* v. *Todd*, 309 U.S. 280; *Davidson* v. *Grady*, 105 F. 2d 405, 408 (C.A. 5); *Gersten* v. *United States*, 364 F. 2d 850, 852 (Ct. Cl.). In any event, it is not necessary for the government to show specific reliance on any particular decision invalidating particular claims

[1] And, if required, *Krushnic*. Pet. Br. p. 48, n. 21.

in order to establish an equitable basis for denying direct review. In addition to the creation over time of innumerable competing claims to this great expanse of vacant land in general, a development entirely inconsistent with the *exclusive* possessory right respondents claim, there is the wholly separate factor—equally a form of "prejudice" to the government justifying denial of direct review—that the passage of years has obliterated much of the evidence by which the claims might now be judged. *Russell* v. *Todd, supra*, 309 U.S. at 287; *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37, 41 (C.A.D.C.), certiorari denied, 375 U.S. 822. It was in anticipation of this loss of evidence that the proceedings were brought when they were. *The Federal Shale Oil Co.*, 53 I.D. 213, 216.[2]

Moreover, while no statute of limitations *now* applies, one arguably did in the years prior to 1962. Until that year, jurisdiction over the Secretary could have been obtained only in the District of Columbia, where a three-year statute of limitations applied to all claims not otherwise provided for. 12 D.C. Code 201. That time had already run, as to all of the claims in this case, even before this Court's decision in *Virginia-Colorado* was announced. Supp. 112, 117, 124, 132, 137, 143. Even if not directly applicable, compare *United States ex rel. Arant* v. *Lane*, 249 U.S.

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[2] The very volume of those proceedings, in addition to substantial documentary evidence (A. 70-78; Supp. 15, 25; *Federal Shale Oil Co., supra*, 53 I.D. at 215), makes clear that only assessment work issues were raised in the *Virginia-Colorado* proceedings.

> Where by the terms of an act, the Secretary is required, upon application of the claimant, to issue a patent * * * Congress by implication confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed. * * * [at 218-219].

The Secretary is required to patent oil shale claims which were valid on passage of the Act and which have been "thereafter maintained". Accordingly, his duty is as much to decide the legal question what constitutes maintenance and the factual question whether a claim has thus been maintained as it is to decide the requirements for validity and whether in fact a claim is valid. *West*, it may be remembered, was concerned with an action of Secretary Fall facilitating the grant of valuable oil rights to Standard Oil. In finding that he had had no affirmative duty to help Standard Oil in that way, and thus that his action was without effect, the Court stated that "His duty in respect to the land was solely that owed to the United States" [at 219] and that to find that he had the authority he claimed to release the lands would be to make him "an agent rather for relinquishing than for preserving the rights of the United States in the public lands" [at 221]. In the present case, the Secretary measured up to his obligations; in construing and enforcing the maintenance requirement, he acted in full pursuit of the duty he owed to the United States to protect its lands.

II. THE MEANING OF THE MAINTENANCE REQUIREMENT

A. Respondents' suggestion makes the maintenance requirement ineffective.

While our reading of *Virginia-Colorado* may be "*somewhat* tortuous" as compared to outright overruling (Pet. Br. p. 47; emphasis added), it has a virtue which respondents' discussion entirely lacks: it gives some content to the statutory requirement of maintenance. Section 37 of the Leasing Act did not, after all, save existing valid claims in an absolute sense; it saved them only if they were "thereafter maintained." 30 U.S.C. 193. Whether or not it was a sensible conclusion in terms of prior mining law, this Court found that the *Virginia-Colorado* claims were being "maintained" because the claimants had responded to the Secretary's process with an offer to resume assessment work. 295 U.S. at 646. That offer fully distinguishes most if not all of the claims involved in the present case.[4]

Respondents' only suggestions as to what the maintenance requirement might have meant are (1) that possibly relocation could have been effected by claimants of minerals which were not subject to the Leasing Act—an issue which they state was never litigated; and (2) that among co-owners of a particular possessory right, the possibility of forfeiture of inter-

[4] In particular, there was a complete failure of response regarding the Bute, Atlas and Camp Bird claims, which represent 13,760 acres, or about 75 percent of the area subjected to the cancellations involved in this case. Supp. 61, 70, 76, 82, 90, 95.

est to a co-owner who volunteered assessment work to which the others did not contribute was a sanction encouraging the performance of assessment work. But the impossibility of relocation for non-Leasing Act minerals *was* settled, contrary to respondents' suggestion, as early as 1924. *Applicability of the Mining Laws, etc.*, 50 L.D. 650; *Joseph E. McClory*, 50 L.D. 623; Widman, Brightwell & Haggard, *Legal Study of Oil Shale on Public Lands* (1969) 243 and 248 n. 3. The Leasing Act in express terms withdraws from location not just the deposits of the minerals involved but "the lands containing such deposits," 30 U.S.C. 181. The Multiple Mineral Development Act of 1954 was enacted explicitly to remove that barrier, since much of the land concerned had subsequently proved valuable for uranium.[6] *E.g.*, S. Rep. No. 1610, 83d Cong., 2d Sess. (1954) 1 ("[L]and * * * known to be valuable for * * * Leasing Act minerals, could not be located under the mining laws.")

Between 1920 and 1954, then, an oil shale claimant could be quite sure that no one would be able to relocate his claim. Once *Virginia-Colorado* had been decided, there was no longer any possibility of loss to an outside claimant through failure to do assess-

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[6] Respondents suggest that their post-1954 assessment work served to protect their claims from relocation under the 1954 Act. TOSCO Br. 14 n. 27; 30 U.S.C. 525(c). The argument would be more convincing if the record showed such work to have been done in every year since 1954. From what appears, work was done only to the extent necessary to justify forfeiture and qualify for patent. Supp. 68-69, 75, 81, 89, 93, 102.

ment work and hence no pressure whatsoever to "maintain" it—even though the statute did require maintenance as a condition of continuing validity.

Since no outsider could take over the claim, any assessment work that was done was volunteered. That such volunteer work could nonetheless support a forfeiture as between insiders was not decided as a matter of Colorado state law until 1961, and then over vigorous and persuasive dissent. *Hamilton* v. *Ertl*, 146 Colo. 80, 360 P. 2d 660. In any event, such work does not "maintain" the claim, for the claim merely changes hands within the claimant group; any pressure is not to do the volunteer work, but to contribute ratably to its cost once it has been done.

Thus, while respondents accuse the government of reading too much into the maintenance clause, they in effect would read it out of the statute; for as they construe it, the holder of "valid claims existent on February 25, 1920" was under no enforceable maintenance obligation if a discovery had been made. It is as if the reference to 'maintenance thereafter' had been completely omitted. But Congress had no purpose to confer an unassailable right on those who merely held land without developing it. Its willingness to confer title in return for $500 qualification work and $2.50 per acre hardly shows an intent to confer the practical equivalent of title—an *indefeasible* possessory right—for no consideration at all. Rather, the maintenance requirement must be given at least the minimal content implicit in *Virginia-Colorado*. For, under respondents' reading, it not

merely preserved existing rights, but rather created possessory rights of a nature never before encountered in the mining laws—rights entirely inconsistent both with the new policy embodied in the Leasing Act and with the congressional anticipation of diligence manifest throughout the legislative history.[7]

B. By requiring that existing valid claims be "thereafter maintained," Congress understood that annual assessment work would have to be done.

Contrary to respondents' contentions, the available materials show a general understanding in 1920 that locators were required to do assessment work in order to "maintain" their claims. The link had been established with enactment of the assessment work

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[7] The respondents' reading of the assessment work statute leads to other problems.

> There is no way to quickly and easily determine whether an owner remains seriously interested in developing his claim, or has decided to maintain only a nominal investment. In cases where land is not subject to a withdrawal order, such a determination is far more simple. If the work has not been performed, the claimants' rights are subject to termination on a relocation by others. But on withdrawn lands, where no one has the power to relocate, a claim interest remains valid until the government assembles sufficient evidence to challenge the claim on the basis of abandonment. What was formerly a moderately efficient system permitting termination of rights in unattractive claims, with the moderate cost burden of showing validity imposed on the claim owner, has been transformed, in the case of withdrawn lands, into an inefficient system which, if other claim requirements have been satisfied, imposes on the government the burden of proving an abandonment case.

Widman, Brightwell & Haggard, *op. cit. supra*, 326-327.

requirement in 1872, when its proponent, Senator Cole of California, explained it as intended:

> to insure good faith in the working of the mines, to prevent their being held by owners an indefinite length of time without working them * * *, [to] require the miner to use some little diligence and exertion in the working of his mine * * * or else leave it subject to a beneficial use by some other party. [Cong. Globe, 42d Cong., 2d Sess., Pt. 3, 2459 (1872).]

While the government generally disclaimed interest in the performance of assessment work, as such,[8] the failure to do assessment work was often equated with abandonment (in which the government did have an interest) even where lands had not been

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[8] *Procedure to Obtain Patent to Mineral Lands*, 37 L.D. 763. As suggested by the title, these regulations explained in general terms the steps required to obtain patent. One of the requirements was that the applicant show that he had a "possessory right to the premises * * * in virtue of a compliance * * * [with state and local law] and with the mining laws of Congress." 37 L.D. at 766. In stating thereafter that the annual assessment work is "solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts," 37 L.D. at 769, the regulation sought to assure the applicant for patent that even if he had not done assessment work for one or more years prior to his application, his possessory right under the mining laws of Congress was not automatically forfeit; another claimant must have filed a claim during the period of lapse in order to divest him. In so stating, it in no way indicated that the government itself could not initiate contest proceedings, as it did here, when the assessment work was not done, private top-filing was no longer possible, and the land was needed for a public purpose.

withdrawn from location. Widman, Brightwell & Haggard, *op. cit. supra*, 189-193, 349. The proposition that "The [possessory] right is lost only by abandonment, *as by non-performance of the annual labor required*" (*Union Oil Co.* v. *Smith*, 249 U.S. 337, 349; emphasis supplied) was familiar learning in 1920.[9] As to lands which had been withdrawn without possibility of relocation, the government's direct interest in maintenance—*i.e.*, assessment work—was well established by the line of cases developed in our main brief.[10]

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[9] Thus, this Court's remark in *Virginia-Colorado* that the failure to do assessment work had provided "no *ground* for a charge of abandonment," 295 U.S. at 646 (emphasis added), is misleading, if not inconsistent with prior law. What may have been meant was that given both *Krushnic* and the Virginia-Colorado Company's prompt response to the Secretary's challenge, the failure to do assessment work in 1930-1931 could not be considered evidence of abandonment *in that case*. Such a statement, appropriate enough under the particular facts of *Virginia-Colorado*, would not speak to the cases where the work had lapsed before *Krushnic*, when there was widespread understanding that the work was required, or to cases where the Secretary's actions went unopposed or unattended by an offer to resume. To the extent the Court's words appear to go further, they inaccurately characterize the law; "[o]f course, under [the mining law] a mining claim may be abandoned by failure to do the required development work." *Donnelly* v. *United States*, 228 U.S. 243, 267.

[10] Br. 48-57. Without restating that analysis, we note that the cases respondents cite in opposition to it are readily distinguishable. *Proceedings Against Mining Claims Within the Area of the Boulder Dam Project*, 53 I.D. 228, and *Challenge to Validity of Mining Claims in National Parks*, 53 I.D. 491, were both decided in the shadow of *Krushnic*. And the several homestead cases cited at pages 87-88 of the TOSCO

Strikingly, congressional understanding that assessment work had to be done to "maintain" a claim is shown by the legislative history of the very Acts which respondents cite to show that Congress knew how to provide for forfeiture through failure to do assessment work if it wished to (TOSCO Br. 86). Thus, in the only debate on the Act of March 2, 1907, 34 Stat. 1243, governing Alaskan mining claims, its proponent explained its effect as follows:

> *These two propositions are all that are involved in this bill:* First, that $25 of the $100 worth of work shall be done on the roads [instead of

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brief each involved settlers who were in fact on the land, maintaining their claims, but who neglected to comply with technical filing requirements in registering their claims. Like *Krushnic*, those were cases in which the governmental claim depended on the existence of a hypothetical continuing withdrawal interest, which would automatically seize upon the land and retrieve it to the government once any lapse occurred—however minor the lapse, and even if it was repaired before the government actually asserted its interest in the land. That doctrine, like that repudiated in *Krushnic*, would have led to results which were both harsh and unlike the ordinary outcome of private disputation in situations unaffected by withdrawals.

The homestead cases make quite clear, however, that the government would prevail if it could show that at the time of its claim the homesteader was no longer using the land in fact. *James Morris*, 47 L.D. 326, 328-329; *Lizzie Trask*, 39 L.D. 279, 281; *Winfred S. Schmitz*, 38 L.D. 587, 589. So here, we are not arguing that the government is entitled to possession as a "continuing adverse claimant," TOSCO Br. 87; we contend only that where land has been withdrawn from location, assessment work lapses, and *during the period of lapse* (non-maintenance or disuse) the government asserts a specific interest in the land for public use, it is entitled—like any relocator or competing settlor—to obtain the possessory right.

> the mine property proper]; and, second, the filing of proof of the fact of the doing of the work with the recorder of the district. [40 Cong. Rec. 2903 (1906); emphasis added.]

The provision in that Act for automatic forfeiture upon failure to do the work evidently was thought not to be new or strange, but to state existing law—it was agreed that "The general law requires that * * * the locator of a claim shall do a hundred dollars' worth of work a year * * * " [*Id.*, 2902]. Similarly, the Act of January 11, 1915, 38 Stat. 792, validating certain phosphate claims, was meant to benefit those claims which had been worked "in good faith," H.Rep. No. 1020, 63d Cong., 2d Sess. 2 (1914), but not those on which assessment work had not been done annually. This equation between "good faith" and the annual performance of assessment work, again, shows a congressional understanding that the assessment work obligation was mandatory under the law, and is entirely inconsistent with the hypothesis that Congress would permit the perpetuation of claims for an indefinite period without such work being done. True, congressional choice of language in one statute sometimes suggests that the omission of similar language in another was intended to achieve a different result. But where, as here, the more explicit legislation is of minor import and its history shows that the additional language was understood to work no change, the more reasonable conclusion is that the language only shows what Congress understood the requirements of existing law to be. And that understanding, evidently, was that the

performance of assessment work was required to maintain a claim under the Act of 1872.

Legislative materials recently found in Department of Interior files, and set out in the Appendix, *infra*, reflect the same understanding. These consist of correspondence between the Acting Secretary and the Chairmen of the House and Senate conferees after the 1920 Act had gone to conference, in which the Department sought to have Section 37 amended. The proposed amendment would have distinguished between withdrawn and unwithdrawn areas, and would have made clear that as to claims on which discovery had not yet been made, more would be required than mere performance of $100 assessment work annually. The proposal came too late, and no action was taken on it. What is significant here, however, is the assumptions which underlay the correspondence: that under Section 37 as it lay before the Conference Committee, "performance of $100 worth of labor or assessment work annually" *would* be required to maintain a claim. (App., *infra*, at 22, 24, 27, 28-29.)[11] The Department wrote to complain that, in the pre-discovery context, that was not enough.

We do not suggest that the Congress focussed carefully and precisely on this problem, for no one would have imagined that the assessment work obligation would be denied. As respondents agree, the focus was elsewhere, on the problem of crude oil

[11] The letters also support our contention, Br. 58, 62-63, that the lease-exchange provision of the Act, 30 U.S.C. 241(a), was considered to be a major source of relief for current claim-holders. App., *infra*, pp. 21, 23.

and of diligence in prospecting for it. But a fair and objective reading of the legislative background, as set out here and in our main brief, makes clear that the context in which Congress acted was one of general acceptance of the proposition that assessment work had to be done to "maintain" a claim. Its requirement in Section 37 that claims be "maintained" to qualify for patent can mean nothing else. Congress was undoubtedly anxious to preserve the existing rights of the diligent (and the quoted passage from Congressman Taylor, TOSCO Br. p. 93, proves no more).[12] But there is no indication that

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[12] Addressing the House 19 years later in support of H.R. 6560 (76th Cong.), on which respondents also rely, TOSCO Br. 110 n. 137, the *same* Congressman Taylor (*Congressional Directory* (1st ed. 1938) 14) stated:

> Mr. Speaker, this applies to about 30,000 acres of oil-shale land, nearly all in my home county. People have been holding if for years and years without complying with the [assessment work] law and without being entitled to it. This is to require them to comply with the law or else let the land revert back to the control of the United States. * * *
>
> * * * *
>
> MR. CASE of South Dakota. Are they not subject to existing laws so that they can be ousted?
>
> MR. TAYLOR of Colorado. No. *The courts have held* that cannot be done. They have been holding these lands for years and paying nothing. They prevent anybody else from getting the land. [84 Cong. Rec. 8729 (1939); emphasis added.]

There were other indications that *Virginia-Colorado* was viewed as surprising rather than inevitable. See, *e.g.*, Hearings Pursuant to S.Res. 241 (76th Cong.) before a Subcommittee of the Senate Committee on Public Lands and Surveys, 77th Cong., 2d Sess. (1943), Part 5, p. 1954 ("[Oil shale claimants have been occupying the lands] [w]ithout

by withdrawing the lands from relocation it meant to confer on all claimants an indefeasible, indefensible right to possession even thought they might never lift a finger to develop their locations. The contrary holding of *Virginia-Colorado*, "looking largely at cases involving lands open to relocation," [13] ignores the government's valid and specific interests in possession of the land and deprives the statutory maintenance clause of all meaning.[14]

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complying, as I am advised, with the spirit and intent of the law, which was that development work or annual labor should be performed"; Sen. McCarran, Chairman) and p. 1968 ("there must be $100 worth of development work done. That is what the law says. The Supreme Court says in effect that is null and void; that the Act of Congress is of no purpose in that regard, because the development work is not done, and yet the claims are still held in violation of the condition"; Sen. Holman). Of course, as stated in our main brief, p. 64, we cannot deny the existence of legislative efforts to revise *Virginia-Colorado*. None of which we are aware, however, was voted down. None would or could have given any effect to the assessment work lapses of 1920-1935 once *Virginia-Colorado* had been decided. *E.g.*, H. Rep. No. 980, 76th Cong., 1st Sess. (1939) 2-3. And

[13] Widman, Brightwell & Haggard, *op. cit. supra*, at 326.

[14] We note the similar view adopted by the Report of the Public Land Review Commission, *One Third of the Nation's Land*, pp. 124-130 (1970). Compare TOSCO Br. 111-113. In particular, the Commission urges (after setting out the *Virginia-Colorado* interpretation of the statutory obligation) that

> *To prevent speculation and assure diligent effort, an explorer should be required to pay rental, subject to offsetting credits for the actual performance work completed.*
>
> * * * *
>
> *Congress should * * * establish performance requirements designed to assure diligent exploration as a condition of retaining or renewing the exploration right.* [At 126; emphasis in the original.]

III. OTHER ISSUES

Like the issue of the availability to respondents of review of the legal as well as the jurisdictional bases of the assessment work controversies, issues regarding the regularity of the administrative proceedings in *Union Oil* and the effect of the Secretary's post-*Virginia-Colorado* actions have yet to be decided below, and remain open for any remand which might be appropriate upon this Court's decision.

For the reasons shown above and in our principal brief, the decision below was in error and should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

PETER L. STRAUSS,
Assistant to the Solicitor General.

S. BILLINGSLEY HILL,
THOS. L. MCKEVITT,
EDMUND B. CLARK,
Attorneys.

AUGUST 1970.

APPENDIX

DEPARTMENT OF THE INTERIOR
WASHINGTON

Dec. 3, 1919

My dear Senator:

Will you please direct the attention of the conferees on S. 2775 to the provisions of section 37 of said bill as passed by the Senate and as passed with amendments by the House of Representatives?

The Commissioner of the General Land Office and other officers of this Department are somewhat uncertain as to its scope and effect, and fear that such a construction might be placed upon it as would almost nullify the leasing provision of the bill, deprive the States and United States of the revenue which it is thought will arise from the leasing of the mineral deposits in question, and permit large areas of public lands to be held indefinitely by nominal compliance with the provisions of the old general mining laws. I refer particularly to that portion of the section which, after repealing the general mining laws in so far as they apply to the deposits named therein, reads as follows:

> * * * except as to valid claims existent at the date of the passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery. * * *

While I believe the language in question does not apply or was not intended to apply to claims in withdrawn areas, particularly in view of the ample provision for relief as to such claims provided in sections 18 and 19, still it is susceptible of the construction above indicated. But even if this provision of section 37 is construed to apply only to *un*withdrawn lands, it seems to me that it is still objectionable, in that it

makes no provision for diligence in perfecting the claims and fixes no time limit within which the claims shall be perfected. In other words, may not mere paper locations be held indefinitely from use and development by the performance of $100 worth of labor or assessment work upon each claim annually?

I think that neither House had any such purpose in mind in enacting the legislation, but the possible situation created by the language of the section is so serious that I am writing to call it to your attention with the suggestion that section 37 be so amended and limited as to protect only locations on *un*withdrawn lands where the claimants thereof are, at the date of passage of the act, in diligent prosecution of work leading to discovery, and who continue such diligence to discovery. Permit me to suggest, therefore, that the section be amended by omitting the words "including discovery" in line 5, page 41, of the "Comparative Print", and inserting after the word "laws", the following proviso:

> *Provided*, That the rights of any person who, at the date of the approval of this act, is a *bona fide* occupant or claimant under the mining laws heretofore existing, of unwithdrawn oil or gas lands, and who, at such date, is in the diligent prosecution of work leading to discovery of such minerals and who continues such diligence to discovery, may perfect and acquire title to such claims under such mining laws.

I am addressing a similar letter to Mr. Sinnott, Chairman of the House Conferees.

Cordially yours,

(Signed) ALEXANDER T. VOGELSANG
Acting Secretary

Hon. Reed Smoot,
United States Senate.

DEPARTMENT OF THE INTERIOR
WASHINGTON

Dec. 3, 1919

My dear Mr. Sinnott:

Will you please direct the attention of the conferees on S. 2775 to the provisions of section 37 of said bill as passed by the Senate and as passed with amendments by the House of Representatives?

The Commissioner of the General Land Office and other officers of this Department are somewhat uncertain as to its scope and effect, and fear that such a construction might be placed upon it as would almost nullify the leasing provision of the bill, deprive the States and United States of the revenue which it is thought will arise from the leasing of the mineral deposits in question, and permit large areas of public lands to be held indefinitely by nominal compliance with the provisions of the old general mining laws. I refer particularly to that portion of the section which, after repealing the general mining laws in so far as they apply to the deposits named therein, reads as follows:

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37 is construed to apply only to *un*withdrawn lands, it seems to me that it is still objectionable, in that it makes no provision for diligence in perfecting the claims and fixes no time limit within which the claims shall be perfected. In other words, may not mere paper locations be held indefinitely from use and development by the performance of $100 worth of labor or assessment work upon each claim annually?

I think that neither House had any such purpose in mind in enacting the legislation, but the possible situation created by the language of the section is so serious that I am writing to call it to your attention with the suggestion that section 37 be so amended and limited as to protect only locations on *un*withdrawn lands where the claimants thereof are, at the date of passage of the act, in diligent prosecution of work leading to discovery, and who continue such diligence to discovery. Permit me to suggest, therefore, that the section be amended by omitting the words "including discovery" in line 5, page 41, of the "Comparative Print", and inserting after the word "laws", the following proviso:

> *Provided*, That the rights of any person who, at the date of the approval of this act, is a *bona fide* occupant or claimant under the mining laws heretofore existing, of unwithdrawn oil or gas lands, and who, at such date, is in the diligent prosecution of work leading to discovery of such minerals and who continues such diligence to discovery, may perfect and acquire title to such claims under such mining laws.

I am addressing a similar letter to Mr. Smoot, Chairman of the Senate Conferees.

Cordially yours,

(Signed) ALEXANDER T. VOGELSANG
Acting Secretary

Hon. N. J. Sinnott,
House of Representatives

Reed Smoot, Utah,
Chairman.

UNITED STATES SENATE,
COMMITTEE ON PUBLIC LANDS.

December 4, 1919.

Hon. Alexander T. Vogelsang,
Acting Secretary, Department of the Interior,
Washington, D.C.

Dear Mr. Vogelsang:

I am in receipt of your letter of December 3, 1919, suggesting a certain amendment to section 37 of the Oil Leasing Bill.

In answer will state that the suggested change is not in conference, therefore it is doubtful if the suggestion can be complied with. I shall call it to the attention of the conferees, however.

With best wishes, I remain,

Yours truly,

/s/ Reed Smoot

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE PUBLIC LANDS
WASHINGTON, D.C.

Dec. 3, 1919.

Hon. Alexander T. Vogelsang,
Acting Secretary of the Interior,
Washington, D. C.

My dear Mr. Vogelsang:

I am just in receipt of yours of December 3rd with reference to Section 37 of S. 2775, the oil leasing bill.

I shall be glad to give careful consideration to your views and call the same to the attention of the Conference Committee. I do not know that I just understand your reference in the first paragraph on page 2, to the $100 worth of labor or assessment work. Do you have in mind assessment work under the state laws or under the federal statutes? As I understand, under the federal statute assessment work is required only after discovery.

With kindest regards, I remain

Very truly yours,

/s/ N. J. Sinnott

S/C

[Dec. 4, 1919 Answered]

DEPARTMENT OF THE INTERIOR
WASHINGTON

Dec. 4, 1919

Hon. N. J. Sinnott,
Chairman Committee on Public Lands,
House of Representatives.

My dear Mr. Sinnott:

I have yours of December 3, 1919, relative to my letter of the same date, regarding section 37 of S. 2775, the oil-leasing bill, and note your comment with respect to that part of page 2 of my letter which suggested that possibly under the section as it now stands the land covered by paper locations might be held indefinitely from use and development by the performance of $100 worth of labor or assessment work upon each claim annually.

You are correct in the statement that assessment work under the Federal statutes is contemplated and required only after the discovery of mineral, for the reason that the Federal statutes do not recognize any location as valid until mineral has been discovered. However, section 37 of S. 2775 would change this, because it provides that claims may be held under the mining laws, notwithstanding the enactment of the leasing law, and perfected under such laws, "including discovery." This phrase, if enacted, would modify the requirements of the general mining laws as to discovery as to this class of claims and permit them to be maintained prior to discovery, thus giving ground for the contention at least that such claims, prior to discovery, might be held by the performance

of $100 worth of labor or work annually. Furthermore, after discovery they could undoubtedly be held indefinitely by the performance of that amount of assessment work, without production or without payment of the $2.50 per acre required in connection with an application for patent under the general mining laws.

The amendment suggested by me was designed to require diligence in development and discovery work, and this, as you are aware, under the Pickett Act as construed by this Department and by the courts, means very much more in the way of continuity and amount of work than the requirements as to labor now contained in either Federal or State statutes.

Cordially yours,

(Signed) ALEXANDER T. VOGELSANG
Acting Secretary

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 400904 104

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HICKEL, SECRETARY OF THE INTERIOR *v.* OIL SHALE CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 25. Argued October 22, 1970—Decided December 8, 1970

The General Mining Act of 1872 provided that until a patent issued for a mineral location on lands belonging to the United States "not less than $100 worth of labor shall be performed or improvements made during each year," and that a patent could issue on a showing that the claimant had expended $500 of labor or improvements on the claim. Failure to do the assessment work generally entitled others to relocate the claim. Under the Mineral Leasing Act of 1920 lands theretofore open to location and acquisition of title became available only on a lease basis, but a Saving Clause covered valid claims existent on February 25, 1920, "and thereafter maintained in compliance with the laws under which initiated." All the claims involved in this suit were cancelled by the Secretary of the Interior in the early 1930's because the annual assessment work, required by the 1872 Act, had not been performed. In attempting to establish their oil shale claims in Colorado under the 1872 Act, respondents brought this action in the District Court to require the Secretary of the Interior to patent the claims or to expunge his rulings cancelling the claims for lack of annual assessment work and to enjoin him from enforcing them. The District Court and the Court of Appeals, ruling in favor of respondents, held that the Department of the Interior had no jurisdiction to cancel the claims. The courts relied on *Wilbur* v. *Krushnic*, 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, where this Court declined to interpret the Mineral Leasing Act as requiring the return to the Government of full possessory rights to lands subject to oil shale claims for defaults in assessment work. The decisions indicated that failure to perform such work made the claims subject to reloca-

Syllabus

tion by others but not forfeiture to the Government. *Held:* The Saving Clause of the Mineral Leasing Act makes the United States the beneficiary of all claims that are invalid for lack of assessment work or otherwise, and the Department of the Interior had subject matter jurisdiction to determine whether respondents' claims were "maintained" within the meaning of that clause, including the performance of adequate assessment work. *Krushnic, supra,* and *Virginia-Colorado, supra,* must be confined to situations where there has been substantial compliance with the assessment work. Pp. 3–10.

406 F. 2d 259, reversed and remanded.

DOUGLAS, J., filed the opinion for the Court, in which BLACK, BRENNAN, and BLACKMUN, JJ., joined. STEWART, J., with whom THE CHIEF JUSTICE concurs, filed a dissenting statement. HARLAN, WHITE, and MARSHALL, JJ., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 25.—October Term, 1970

Walter J. Hickel, Secretary of the Interior, Petitioner, *v.* The Oil Shale Corporation et al. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[December 8, 1970]

Mr. Justice Douglas delivered the opinion of the Court.

This case involves six groups of claims to oil shale located in Colorado and asserted under the General Mining Act of 1872, 17 Stat. 91, 30 U. S. C. §§ 22, 26, 28, and 29. Section 28 of that Act provided that until a patent issued "not less than $100 worth of labor shall be performed or improvements made during each year." [1] And § 29 provided that a patent to the claim could issue on showing that the claimant had expended $500 worth of labor or improvements on the claim. These claims are not patented and were cancelled in the early 1930's

[1] Section 28 reads:

". . . On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. . . . [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. . . ."

Section 29 reads in part:

". . . The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States supervisor of surveys that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors. . . ."

on the ground that the amount of labor or improvements specified in § 28 has not been made "during each year."[2]

Some of the claimants in this case applied for patents between 1955 and 1962. The Land Office rejected the patent applications because the claims had been cancelled. On appeal, the Secretary of the Interior, acting through the Solicitor, ruled that these cancellations were effective, later judicial determinations of the invalidity of the grounds for cancellation notwithstanding. *Union Oil Company*, 71 I. D. 169.[3] These claimants then sought an order to compel the Department to issue the patents. They argued that the Land Office was without authority to cancel the claims when it did and that the Secretary of the Interior had nullified all the contest proceedings in 1935. In the alternative, they sought judicial review of those contest rulings. Respondent—Oil Shale Corporation—commenced this action in the District Court, not to require the Secretary to issue a patent but to expunge the rulings of the Secretary cancelling the claims and to enjoin him from enforcing them. All the cases were consolidated for trial in the District Court. The District Court granted the relief, 261 F. Supp. 954, and the Court of Appeals affirmed, 406 F. 2d 259, both holding that cancellations for lack of assessment work were void because the Department did not have jurisdiction over the subject matter. The cases are here on petitions for certiorari which we granted to consider whether *Wilbur* v. *Krushnic*, 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, had been correctly construed

[2] For a description of the claims involved in this case see the Appendix to this opinion.

[3] It was admitted that the cancellations may have been erroneous. He declared, however, that the Commissioner had jurisdiction to make the determinations. Therefore, since the rulings were not appealed from, they were *res judicata*, not subject to attack in 1962.

and applied to invalidate the Secretary's action in protection of the public domain.

Before we come to a consideration of the *Krushnic* and *Virginia-Colorado* cases it should be noted that in 1920, Congress by enacting the Leasing Act, 41 Stat. 445, 30 U. S. C. § 241 (a), completely changed the national policy over the disposition of oil shale lands. Thereafter such lands were no longer open to location and acquisition of title but only to lease. But § 37 contained a Savings Clause which covered "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Respondents contend that their claims fall within that exception.

Respondents assert that a like claim was recognized and approved in the *Krushnic* case. In that case, however, labor in the statutory amount had been performed, including the aggregate amount of $500. The only default was in the failure to perform labor for one year during the period. Mandamus for the issuance of a patent was directed, the Court saying:

> "Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership . . . , as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted." 280 U. S., at 317.

The Court further held that the claims were "maintained" within the Savings Clause of the Leasing Act

by a resumption of the assessment work before a challenge of the claim by the United States had intervened.

Virginia-Colorado also involved claims on which labor had been expended except for one year. It was alleged, however, that the claimant had planned to resume the assessment work but for the Secretary's adverse action and that the claims had not been abandoned. The Court held that the claims had been "maintained" within the meaning of the Savings Clause of the Leasing Act of 1920.

Those two cases reflect a judicial attitude of fair treatment for claimants who have substantially completed the assessment work required by § 28. There are, however, *dicta* both in *Virginia-Colorado* and in *Krushnic* that the failure to do assessment work gives the government no ground of forfeiture but inures only for the benefit of relocators.

Indeed § 28 of the 1872 Act, as already noted,[4] provides that upon the failure to do the assessment work, "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made" provided the assessment work has not been "resumed" upon the claim "after failure and before such location." It is therefore argued that so far as the 1872 Act is concerned the failure to do the assessment work concerns not the government but only "rival or adverse claimants." [5]

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[4] See n. 1, *supra*. For a recent account of the operation of the 1872 Act and the Leasing Act of 1920 see One Third of the Nation's Land, Report by the Public Land Law Review Commission, pp. 124–138.

[5] The regulations provide:

"The annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes (30 U. S. C. 28), is, . . . solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts." 43 CFR 3420.4.

The problem in those two cases and the present one concerns the Savings Clause in the Leasing Act which, as noted, makes available for patent "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated." Concededly failure to maintain a claim made it "subject to disposition only" by leasing by the United States. Hence if we assume, *arguendo*, that failure to do assessment work as provided in § 28 of the 1872 Act concerned at the time only the claimant and any subsequent relocator, the United States, speaking through the Secretary of the Interior, became a vitally interested party by reason of the 1920 Act. For it was by that Act that Congress reclaimed portions of the public domain so that land might be disposed of by a different procedure (leasing) to the same end (oil shale production [6]) or devoted to wholly different purposes [7] within the purview of public policy as determined by Congress.

It appears that during the pre-1920's oil shale claims were affected by a speculative fever. Then came a period of calm. By the late forties and continuing into the sixties speculators soughts out the original locators or their heirs, obtained quit claim deeds from them, and

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[6] The value to the Government of the Leasing Act is shown by the magnitude of the interests at stake. We are told that respondent Oil Shale Corporation bid for a lease of 5,120 acres of federal oil shale land in Colorado. 33 Fed. Reg. 16154. The projected operations were estimated to yield 40 gallons of oil per ton, the royalty being 24¢ per ton. *Id.*, 16156. The projected mining rate of 66,000 tons per day for 330 days a year would produce an annual royalty of $5,250,000. The project life was 20 years.

[7] The lands containing oil shale became open to agricultural and other non-mineral entries including, *inter alia*, the Stock Raising Homestead Act of 1916, 39 Stat. 862, 43 U. S. C. § 291, to oil and gas and sodium leasing under the 1920 Act, to Indian tribal lands in Utah and to grazing districts under the Taylor Grazing Act, 48 Stat. 1269, 43 U. S. C. § 315.

thereupon forfeited out all other record title holders by performing assessment work for one year.[8] It appears that 94 of the 98 claims involved in the present litigation were of that character. There is nothing reprehensible in the practice, if the procedure is one which Congress has approved. But the command of § 28 of the 1872 Act is that assessment work of $100 be done "during each year" and the Savings Clause of § 37 of the 1920 Act requires that for lands to escape the leasing requirement the claims must be "maintained in compliance with the laws under which initiated."

The legislative history of the 1872 Act does not throw much light on the problem. Senator Cole, proponent of that Act, explained, however, that the requirement of assessment work was made to adopt the Spanish law which granted mining titles but subjected them "to what they term denouncement of the title or defeasance of the title upon a failure to work the mine after a certain time." Cong. Globe, April 16, 1872, p. 2459. While the objective of the 1872 Act was to open the lands "to a beneficial use by some other party," once the original claimant defaulted, the defeasance inevitably accrued to the United States, owner of the fee. On that premise it would seem that the dicta in *Krushnic* and in *Virginia-Colorado* are not valid.

The history of the 1920 Act throws a little light on the problem.

In the Senate there was a considerable debate over the addition of the words "including discovery" at the end of § 37, which contains the Savings Clause.

> "Mr. JONES of New Mexico. Suppose we use the words 'including discovery.'
>
> "Mr. SMOOT. Very well; if the Senator desires to insert the words 'including discovery' I shall offer no objection.

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[8] See n. 3, Appendix, *infra*.

"Mr. WALSH of Montana. Mr. President, I was going to say to Senators that to my mind discovery does not necessarily perfect the claim, because the claimant would not be entitled to a patent unless he had performed $500 worth of work, and in a just sense his claim would not be protected.

"Mr. SMOOT. The words 'under such laws' cover everything—the $500 worth of work, discovery, and everything else.

"Mr. WALSH of Montana. But the words 'including discovery,' now proposed, it seems to me, will make it plain.

"Mr. SMOOT. I have no objection to those words going in the bill." 58 Cong. Rec. 4584.[9]

The "perfection" of the claims "under such laws" thus seemingly meant compliance with "everything" under § 28 which taken literally would mean assessment work of $100 "during each year."

If we were to hold to the contrary that enforcement of the assessment work of § 28 was solely at the private initiative of relocators, the "maintenance" provision of § 37 becomes largely illusory, because relocation of oil shale claims became impossible after the 1920 Act. So if enforcement of the assessment work requirement of § 28 were dependent solely on the activities and energies of oil shale relocators, there was no effective enforcement device. While the area covered by the claims might possibly be relocated for wholly different purposes, the likelihood was so remote that the Court of Appeals concluded that "The old claims were thus sheltered by the [1920] Act." That meant that a claim could remain immune from challenge by anyone with

[9] The Amendment was thereupon agreed to. There was no change made in the House in this respect. H. Rep. No. 398, 66th Cong., 1st Sess., p. 11. And see the Conference Report, H. R. Rep. No. 600, 66th Cong., 2d Sess., p. 16.

or without any assessment work, in compete defiance of the 1872 Act.

The Court concluded in *Virginia-Colorado,* that the lapse in assessment work was no basis for a charge of abandonment. 295 U. S., at 645–646. We construe that statement to mean that on the facts of that case failure to do the assessment work was not sufficient to establish abandonment. But it was well established that the failure to do assessment work was evidence of abandonment. *Union Oil Co.* v. *Smith,* 249 U. S. 337, 349; *Donnelly* v. *United States,* 228 U. S. 243, 267. If in fact a claim had been abandoned, then the relocators were not the only ones interested. The United States had an interest in retrieving the lands. See Widman, Brightwell & Haggard, Legal Study of Oil Shale on Public Lands, 189–193 (1969). The policy of leasing oil shale lands under the 1920 Act gave the United States a keen interest in recapturing those which had not been "maintained" within the meaning of § 37 of that Act. We agree with the Court in *Krushnic* and *Virginia-Colorado* that every default in assessment work does not cause the claim to be lost. Defaults, however, might be the equivalent of abandonment; and we now hold that token assessment work, or assessment work that does not substantially satisfy the requirements of § 28 of the 1872 Act is not adequate to "maintain" the claims within the meaning of § 37 of the Leasing Act. To hold otherwise would help defeat the policy that made the United States, as the prospective recipient of royalties, a beneficiary of these oil shale claims. We cannot support *Krushnic* and *Virginia-Colorado* on so broad a ground. Rather, their *dicta* to the contrary, we conclude that they must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act, so that the "possessory

title" of the claimant, granted by § 26, will not be disturbed on flimsy or insubstantial grounds.

Unlike the claims in *Krushnic* and *Virginia-Colorado,* the Land Commissioner's findings indicate that the present claims had not substantially met the conditions of § 28 respecting assessment work. Therefore we cannot say that *Krushnic* and *Virginia-Colorado* control this litigation. We disagree with the *dicta* in these opinions that default in doing the assessment work inures only to the benefit of relocators, as we are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work. We conclude therefore that the judgments below must be reversed.

Respondents rely upon the response of the Department of the Interior to the *Virginia-Colorado* case in which the Secretary declared the contest in that case to be "void." He also declared that "other Departmental decisions in conflict with this decision are hereby overruled." *The Shale Oil Company,* 55 I. D. 287. This decision, they argue, nullified the previous contest proceedings in which their claims were voided. Moreover, they contend that this administrative rule of 35 years, upon which the Department itself has relied, may not now be retroactively changed. In addition, they claim that these contest decisions, if still valid, are subject to direct judicial review at this time, testing both substantive and procedural errors, such as lack of notice.[10]

These contentions present questions not decided below. Therefore, on remand all issues relevant to the current

[10] The Secretary has held that the old default proceedings are subject to reopening as to any locator for whom receipt of service is not adequately shown. *Union Oil Co. of Calif.,* 72 I. D. 313.

validity of those contest proceedings will be open, including the availability of judicial review at this time. To the extent that they are found void, not controlling, or subject to review, all issues relevant to the invalidity of the claims will be open, including inadequate assessment work, abandonment, fraud, and the like. Likewise all issues concerning the time, amount, and nature of the assessment work will be open so that the claimants will have an opportunity to bring their claims within the narrow ambit of *Krushnic* and *Virginia-Colorado*, as we have construed and limited these opinions.

Reversed and remanded.

THE CHIEF JUSTICE and MR. JUSTICE STEWART dissent. They believe the Court of Appeals in this litigation correctly construed and applied this Court's decisions in *Wilbur* v. *Krushnic*, 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639. Accordingly, unless those decisions are to be overruled, they would affirm the judgment before us.

MR. JUSTICE HARLAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

APPENDIX

One group of claims in question was composed of 48 (Bute) claims located by nine individuals between December 1919 and January 1920, shortly before February 25, 1920, the cutoff date for prior valid claims recognized by the Savings Clause of the 1920 Act.[1] The records show an entry in February 1921 of a "Notice in Lieu of Labor."[2] No other entries were made. In 1954, a man by the name of Ertl acquired the claims of two of this group. In 1955, he filed an "Affidavit of Annual Labor" and published a forfeiture notice in the newspaper.[3] In 1956, he acquired a decree in a Colorado court quieting title in him to all interests in all the claims of this group. Another group of 18 (Atlas) claims was located in December 1919 by nine individuals. In

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[1] Section 37 of the Act, 30 U. S. C. § 193, reads in part: "That the deposits of . . . oil shale, herein referred to, in lands valuable for such minerals . . . shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

[2] Congress suspended the $100 labor or improvements requirement for the year 1919. Such suspensions were also allowed by Congress for the years 1933 to 1938, 1942, 1943, 1948, and 1949.

[3] Section 28 of the 1872 Act provides that where any of several co-owners have not contributed his share of assessment work, one or more co-owners who have done the work may give the delinquent co-owner notice in writing or by publication for at least once a week for 90 days and if at the end of that time the delinquent fails or refuses to contribute his share, "his interest in the claim shall become the property of his co-owners who have made the required expenditures." That federal right is enforceable in state courts. See *Hamilton* v. *Ertl*, 146 Colo. 80.

For the history of the law which allows assessment work on one claim to inure to the benefit of a group of claims see *Union Oil Co.* v. *Smith*, 249 U. S. 337, 350–351.

February 1921 a "Notice in Lieu of Labor" was filed. No other instruments were filed. In 1954, Ertl acquired the interests of two of this group. In July 1955 he filed an "Affidavit of Annual Labor" and published a forfeiture notice. In September, a man named Dutton acquired an interest in the claims of two locators of this group and, in May 1956, Ertl quieted title in himself to the entire group. Another group of 20 (Camp Bird) claims were located in 1920. No instruments were filed regarding annual labor. In 1955, Mr. Dutton acquired the interests of two of the eight locators, and Mr. Ertl acquired the interests of four in 1956. Ertl filed an "Affidavit of Annual Labor" and published a forfeiture notice. Dutton responded and a court quieted title in the two of them, 75% in Ertl and 25% in Dutton.

In January, Ertl transferred all his interest in the above claims to Energy Resources Technology Land, Inc. (ERTL). Mr. Dutton transferred any interest he held in the above claims to ERTL and ERTL conveyed title to 16 of the Butte claims, Nos. 33–48 to Dutton. These 16 claims were eventually purchased by Oil Shale Corporation for $1,536,000. In 1963, Oil Shale leased all of the remaining claims from ERTL for $148,000 per year. Forty-six of the Butte claims, including the 16 purchased by Oil Shale, nine of the Atlas claims and all 20 of the Camp Bird claims are involved in the litigation here.

Another group of 20 claims (Carbon 1–8 and Elizabeth 1–12) passed through several hands, and after notice and forfeiture, as above, are held by Wasatch Development Company and Joseph Umpleby. Sixteen of these are involved here. Another group of four SW, NW, NE, & SE) claims have a similar history, and three of those are involved here. The last group of claims (Oyler Nos. 1–4) is the only group in which there has been no claim of forfeiture. All four of these are involved here.